NO. 83-5644

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

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SUPREME COURT U.S.

ANTHONY ANTONE,

Petitioner,

-v-

CHARLES G. STRICKLAND, JR., Superintendent, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida; JIM SMITH, Attorney General, State of Florida,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the principles of Payton v. New York, should be applied retroactively to a case raising the issue for the first time on collateral review or whether the federal courts are barred under Stone v. Powell, from considering the Payton v. New York issue?

2. Whether petitioner was denied the effective assistance of counsel at the sentencing phase of his capital trial by counsel's failure to present evidence in mitigation, by counsel's failure to present other mitigating circumstances outside the statutorily prescribed factors, by counsel's failure to adequately or effectively present argument during the penalty phase or by counsel's failure to request special jury instructions to clear up deficiencies in the standard jury instructions?

3. Whether in the application of the especially heinous, atrocious and cruel aggravating factor to petitioner's case, the State of Florida had used such a vague and overbroad construction of the factor that the Eighth and Fourteenth Amendments are violated?

4. Whether the failure of the State to comply with the requirements of Brady v. Maryland, and United States v. Agurs, by failing to disclose the existence of a relevant witness thereby precluding petitioner from having a witness to testify in the penalty phase of his capital trial as to the circumstances of the offense denied petitioner his Eighth and Fourteenth Amendment rights?

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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, ANTHONY ANTONE, prays that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed June 13, 1983. Rehearing was denied on September 6, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 706 F.2d 1534 (11th Cir. 1983), and is set out at pages 1a-16a of the Appendix.*/

JURISDICTION

The judgment and opinion of the court of appeals were filed on June 13, 1983, and petitioner's timely petition for rehearing was denied on September 6, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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*/ Citations to the Appendix accompanying this petition are designated App. ___.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution which provides in relevant part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .;

the fifth amendment to the Constitution which provides in relevant part:

> . . . nor shall [any person] be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .;

the sixth amendment to the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance for his defense;

the eighth amendment to the Constitution which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

> [Nor] shall any State deprive any person of life, liberty or property, without due process of law . . . .

It also involves Section 921.141, Florida Statutes (1975), which is set out at App. 17a, 18a.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Petitioner was convicted of the first degree murder of Richard Cloud in the Circuit Court of the Thirteenth Judicial Circuit for Hillsborough County, Florida, on August 27, 1976. (Tr 1878). Immediately following the return of the guilty verdict, the court proceeded with the penalty phase. The jury returned a recommendation of death. The trial judge followed the jury recommendation and immediately imposed

the sentence of death. (Tr 1886-1927).[1/]

On February 16, 1978, the Supreme Court of Florida remanded petitioner's cause to the trial court for a determination of whether there had been a Brady v. Maryland, 373 U.S. 220 (1963) violation committed by the State prior to or during petitioner's trial. Antone v. State, 355 So.2d 777 (Fla. 1978). App. 19a, 20a.

Subsequent to a hearing in the trial court, in which no Brady violation was found, the Florida Supreme Court affirmed petitioner's conviction and sentence of death on March 27, 1980. Antone v. State, 382 So.2d 1205 (Fla. 1980). App. 21a-32a. Certiorari was denied on October 14, 1980. Antone v. State, 449 U.S. 913 (1980).

On September 29, 1980, petitioner joined with other death-sentenced defendants in an application for extraordinary relief and Petition for Writ of Habeas Corpus filed in the Florida Supreme Court. The issue raised involved the ex parte review by the Florida Supreme Court of psychological reports and other prison generated evaluations of death-sentenced inmates. Relief was denied on January 15, 1981. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). This Court denied Certiorari on November 2, 1981. Brown, et al. v. Wainwright, 454 U.S. 1000, 102 S.Ct. 542 (1981).

On January 6, 1982, the Governor of Florida signed a Death Warrant requiring petitioner's execution between January 29, 1982 and February 2, 1982.

1/ References to the various portions of the record relevant to this proceeding are designated as follows:

"Tr" shall refer to transcript of the trial in the Circuit Court for the Thirteenth Judicial Circuit of Florida; held August 23, 1976 through August 27, 1976.

"RPC" shall refer to the record on appeal to the Supreme Court of Florida following the denial of post-conviction relief.

"R" shall refer to orders of the District Court and other documents filed in the District Court.

On January 15, 1982 and January 20, 1982, petitioner's trial counsel and volunteer counsel filed two separate motions for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The Circuit Court in Hillsborough County, Florida denied both motions. App. 33a-41a. This ruling was affirmed by the Florida Supreme Court on January 28, 1982. The court also denied a motion for stay of execution and petition for writ of error coram nobis. Antone v. State, 410 So.2d 157 (Fla. 1982). App. 42a-48a.

On January 22, 1982, petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court, for the Middle District of Florida, Tampa Division. App. 49a-75a. The district court denied the petition on January 29, 1982 by oral order. App. 76a-113a.

An appeal to the United States Court of Appeals for the Eleventh Circuit was immediately filed. On February 1, 1982, the Court of Appeals granted a Stay of Execution pending a remand to the district court for more complete findings of fact and conclusions of law. (Order unreported). App. 114a-116a. A Memorandum of Decision was thereafter entered on February 18, 1982. App. 117a-140a.

On June 13, 1983, a panel of the Eleventh Circuit affirmed the District Court's denial of relief.[2/] Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983). App. 1a-16a. Rehearing was denied on September 6, 1983. App. 142a.

B. Facts Relevant to the Questions Presented

This petition seeks review of several important constitutional issues which have yet to be resolved by this Court. Petitioner initially challenges the applicability of this Court's ruling in Stone v. Powell, 428 U.S. 465 (1976) to issues raised on collateral attack by a undeniable Fourth Amendment violation under Payton v. New York, 445 U.S. 573 (1980). Petitioner also raises an issue regarding Sixth Amendment rights to effective assistance of counsel during the penalty phase of his bifurcated

2/ Although the Court affirmed the District Court's denial of relief, it remanded the case for consideration of the effect

murder trial. Petitioner also challenges the constitutionality of his sentence and the constitutionality of Florida's capital punishment statute which includes as an aggravating factor, that "the capital felony was especially heinous, atrocious and cruel", a factor which has been made unconstitutionally vague and overbroad through its application and construction by the Florida Supreme Court. Finally, petitioner challenges the court of appeals ruling on a Brady v. Maryland, supra, issue as it relates to Eighth Amendment issues concerning jury consideration of all relevant circumstances of the offense and aspects of the defendant's character. These issues raise questions of constitutional significance which have not yet been answered by this Court. The facts giving rise to each of these issues are set forth seriatim.

(1) Petitioner challenges whether he is precluded under the principles of Stone v. Powell, supra, from collaterally asserting issues raised by an illegal, warrantless arrest in his home contrary to Payton v. New York, supra.

Richard Cloud, a suspended police officer with the Tampa Police Department was shot to death in his home on October 23, 1975. A task force of local law enforcement, F. B. I. and Florida Department of Law Enforcement was formed to investigate the murder. (RPC 140, 141). During the course of the investigation, members of the task force came into contact with a Robert Bruns. The first contact with Bruns was on February 20, 1976. (RPC 204). Bruns had been arrested for contempt of court and was incarcerated. While in jail, Bruns contacted the police and informed them that he had information regarding the Cloud murder. (RPC 181, 182). Bruns was taken out of jail by the police. Bruns related to the police that a Benjamin Gilford had been living with him in February 1976. (RPC 166).

2/ continued. case. When the United States Supreme Court entered its opinion in Barclay, 103 S.Ct. 3418 (1983), the Eleventh Circuit granted the State's petition for rehearing to amend the language of the original opinion to conform to the Barclay decision. Antone v. Strickland, ___ F.2d ___, (1983). App. 141a.

During conversations with Bruns, Gilford had explained to him how Cloud had been murdered. (RPC 169). Essentially, Gilford related that he had been with a Marlow Haskew; that Haskew had driven the car; that Gilford had gone up to Cloud's door and when Cloud answered the door, Gilford shot Cloud several times. (RPC 170). Based on this initial conversation with Bruns, Bruns agreed to work with the task force. He was equipped with a body bug by the F.B.I. . (RPC 147, 220, 221). Subsequent conversations were tape recorded on February 21, 22 and 23, 1976 by the F.B.I. . (RPC 220, 221).

Subsequent to the making of the tape recorded conversation, Benjamin Gilford was arrested. The arrest for escape, occurred on February 23, 1976. In his possession at the time of his arrest, was an address book with the name "Anthony" and a phone number. A check of phone records indicated the number was for an Anthony Antone. (RPC 213). The task force had earlier been informed that an "Anthony" was the go-between on the murder and that "Anthony" had supplied the gun and a silencer. (RPC 210).

After Gilford's arrest, members of the task force spoke with him regarding the shooting. On February 24, 1976, he confessed to the homicide. (RPC 218). On February 25, 1976, members of the task force spoke with Marlowe Haskew in Miami, Florida, after his arrest on an attempted burglary charge. (Tr 212, 217, 219). Ultimately, Haskew agreed to cooperate and his brief initial statement implicated the petitioner as a go-between on several "contracts" put out by a Victor Acosta of Tampa. (Tr 276). These "contracts" included the "hit' on Cloud. (Tr 283-286). Haskew indicated that petitioner had supplied the murder weapon and after the murder had help dispose of it by throwing it into Tampa Bay. (Tr 284). Petitioner also promised payment on the contract. (Tr 284). At the direction of law enforcement, Haskew then placed a phone call to petitioner and gave petitioner a coded message. Pursuant to this coded message, petitioner returned a call to Haskew in Miami. During

this conversation, the Cloud murder was mentioned. (Tr 292-295). Both of these calls were recorded by law enforcement,[3/] and petitioner was surveilled going to a pay phone and making a call.

On the basis of this information, a decision was made to arrest the petitioner. Shortly after Haskew's initial statement on February 25, 1976, petitioner was arrested. (Tr 300). The arrest of petitioner took place during the evening hours while he was inside his home in Tampa, Florida. The arrest was effected by members of the task force confronting the petitioner at gunpoint and forcibly entering his residence. (RPC 254, 255). The task force never obtained an arrest warrant authorizing petitioner's arrest. (RPC 289, 290).

Subsequent to the petitioner's arrest, he was transported to the F.B.I. office in Tampa, Florida. After advising petitioner of Miranda, several officers proceeded to interrogate him. (Tr 1585). Although petitioner never admitted any involvement in the homicide (Tr 1597) he did make incriminating statements. For instance, petitioner denied knowledge of two telephone calls, one between he and Gilford and one with Haskew, which the police knew had in fact occurred. (Tr 1588). Additionally, during the interview, the F.B.I. agent interrogating the petitioner placed a phone call to Miami and spoke with Marlowe Haskew. When petitioner was placed on the phone with Haskew, his chief accuser, he kept repeating, "Marlowe, why did you do this to me? Marlowe, why did you do this to me?" (Tr 1588). During the interrogation, petitioner was taken to Tampa General Hospital complaining of chest pains. (Tr 1592). At the hospital; after it had been established that petitioner knew Haskew and Victor Acosta, petitioner asked if they expected him to testify against

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3/ Subsequently, Marlowe Haskew gave a much more detailed statement regarding the Cloud murder, including much greater detail concerning the petitioner. At petitioner's trial, Haskew was the chief witness for the prosecution. (See, Tr 1453-1490).

these "other people." (Tr 1983). Petitioner informed the agents that "he was 100% Sicilian and Sicilian's do not fink." Each of these statements was relied upon by the prosecution to show that petitioner had lied about his lack of involvement in the offense.

Petitioner's trial counsel did not raise the Payton v. New York, supra, issue in his motion to suppress. App. 143a, 144a. Subsequently, it was agreed by all parties that the law in Florida at the time of petitioner's arrest was to the contrary. See, Perez v. State, 277 So.2d 778 (Fla. 1973), wherein the Florida Supreme Court ruled that police could enter a house and arrest without a warrant. (RPC 333).

The Payton issue was raised for the first time in petitioner's 3.850 motion for post-conviction relief filed January 20, 1982. App. 145a-171a. The Circuit Court for the Thirteenth Judicial Circuit denied relief on this ground for the reason that Payton could not be given retroactive application. App. 41a. On appeal to the Florida Supreme Court, the court ruled that Payton was not a change of law which required retroactive application. App. 48a.

In federal District Court, petitioner again asserted the Payton issue. The issue was raised in the context of a Fourth, Sixth and Fourteenth Amendment violation of petitioner's constitutional rights. App. 49a-75a. The district court rejected this claim. In its initial ruling announced orally from the bench the court ruled that since "the State had provided a statutory mechanism for the consideration of such a claim, this claim being a Fourth Amendment claim, and I think Stone v. Powell is supportive of that. In addition, the court has not found any binding authority that the Payton ruling is retroactive . . . and it should not be applied retroactive." App. 80a, 81a. In its subsequent memorandum decision, the court ruled that the court was precluded from considering the merits of the claim under Stone v. Powell, supra. This

was due to the court's finding that petitioner had had an opportunity for hearing on the matter in the state court. App. 121a.

In his brief to the Eleventh Circuit, petitioner again asserted that Payton should be given retroactive application. Petitioner further asserted that Stone v. Powell had no application under circumstances where the law in the State of Florida was contrary to Payton at the time of petitioner's case. Relying on language in Townsend v. Sain, 372 U.S. 293, 317 (1963), petitioner argued that he had not had an opportunity for a full and fair hearing on this issue due to the status of Florida law at the time and the fact that it was unrealistic to expect trial counsel to anticipate such a drastic change in the law. App. 172a-176a.

The Eleventh Circuit affirmed the ruling of the District Court. The Court acknowledged that under United States v. Johnson, ___ U.S. ___, 102 S.Ct., 2579 (1982), Payton was given retroactive application. Although the Court in Johnson did not address the retroactive reach of Payton to those cases which could still raise Fourth Amendment issues on collateral attack, the Eleventh Circuit ruled that it was nevertheless barred from consideration of the issues under Stone v. Powell. App. 7a, 8a.

(2) Petitioner challenges whether he was denied his Sixth Amendment right to effective assistance of counsel during the penalty phase of his trial.

Petitioner has alleged that trial counsel's performance during the penalty phase of his first degree murder trial was ineffective for numerous reasons. Under Florida's bifurcated procedure for the trial of capital cases, a separate sentencing hearing is held upon conviction. App. 17a. The sentencing phase of petitioner's trial was held immediately after the jury verdict of guilty. (TR 1882-1886). Under Florida's procedure, the penalty phase includes an evidentiary portion, arguments

of counsel and instructions on the law. App. 17a, 18a.

The entire evidentiary portion of petitioner's penalty phase is herein set out.[4/]

> . . . At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and in mitigation which you may consider.
>
> You may begin, counsel.
>
> MR. BOWDEN: Thank you, Your Honor. May it please the Court, the State offers into evidence as part of its aggravation, a certified copy of the file pertaining to this defendant from the Department of Offender Rehabilitation of the State of Florida.
>
> THE COURT: Very well. Any objection?
>
> MR. ALFONSO: None, Your Honor.
>
> THE COURT: None? All right. Let it be received in evidence.
>
> MR. BOWDEN: Your Honor, that is the only evidence which the State, additional evidence, I should say, the State will present in aggravation.
>
> THE COURT: All right. Defense?
>
> MR. ALFONSO: Your Honor, the defense intends to put on no evidence in mitigation other than the exhibit which the State has introduced.
>
> THE COURT: It is my understanding that you both are stipulating that it be introduced into evidence inasmuch as you each feel, you, of course, feel there are sufficient aggravating circumstances contained in that file and then you, gentlemen, the defense, feel there are some mitigating circumstances to be considered by the jury in that file as well, correct?
>
> MR. ALFONSO: That's correct, sir.
>
> THE COURT: Then you rest?
>
> MR. BOWDEN: Yes, sir.
>
> THE COURT: And you rest; is that right?
>
> MR. ALFONSO: That's correct, sir.
>
> THE COURT: Then you may make your closing arguments. (Tr 1887-1889) App. 181a-183a.

4/ The entire transcript of the penalty phase of petitioner's trial is reproduced in the Appendix, pages 177a-222a.

Trial counsel did not put on a single witness to testify on behalf of the petitioner. The only evidence introduced was petitioner's file from the Florida Department of Correction. Although this was introduced as a State exhibit in aggravation, it was introduced in effect by stipulation of both parties. (Tr 1888). App. 182a.

The court then proceeded with arguments of counsel. Counsel for the State presented argument which concentrated almost exclusively on the aggravating and mitigating factors set out in Chapter 921.141, Florida Statutes (1975). App. 18a. Under the prosecutor's argument, there were four aggravating factors applicable to petitioner and no mitigating factors. App. 183a-193a. After concluding that no mitigating factors applied, the prosecutor informed the jury, "Those are the only mitigating factors under the statute. This defendant does not qualify for one mitigating factor, not one. He qualifies under four of the statutory aggravating factors." id. at 190a. The argument that these were the only mitigating factors was highly misleading. On the one hand, they were the only factors enumerated in the statute. However, they were not in fact an all inclusive list of those mitigating factors which the jury was entitled to consider.

Petitioner's counsel totally failed to counter the State's presentation that clearly indicated that the process of deciding the question of life or death was one of <u>counting</u> aggravating and mitigating circumstances. Counsel for petitioner used the same format as the prosecutor and confined himself to a review of the statutory aggravating and mitigating circumstances. App. 193a-208a.

The argument makes no reference to non-statutory mitigation at all. In fact, there is no indication anywhere in these proceedings that counsel was aware that he could argue outside of the statutory factors. A good indication that counsel was not aware of this occurs when counsel attempts to argue

disparity of sentence in support of the mitigating factor, "that the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor." App. 203a. Counsel should have argued it as nonstatutory mitigation.

Following arguments of counsel, the court instructed the jury. Petitioner's counsel neither presented nor requested any special jury instructions which could have corrected the limiting nature of the standard instructions. App. 208a-216a.

The District Court rejected this claim. App. 128a-133a. At the outset the district court indicated that petitioner had failed to meet his burden on the ineffective assistance claim because "plaintiff's counsel refused to let trial counsel testify at the evidentiary hearing." id. at 128a. The district court ruling, however, fails to recognize that at the outset, petitioner's counsel, who was volunteer counsel and only recently in the case, requested a continuance of the hearing to allow time for discovery and preparation for the hearing. (RPC 237-246). The motion was denied. (RPC 251). Such additional time was necessary to obtain witnesses and prepare any such presentation. Additionally as recognized by the district court, one of the petitioner's two trial attorneys was presenting one of the two motions for post-conviction relief. When that attorney/witness was called by the State of Florida on the question of ineffective assistance he refused to testify at all. App. 128a, n.7. Petitioner had asserted in the district court that he was effectively denied a fair hearing in the State court. He requested an evidentiary hearing on the matter in the district court as well. This request was denied. App. 128a. On the merits of the issue, the district court found that taken as a whole, trial counsel did not fail to render effective assistance of counsel. App. 132a, 133a.

The Eleventh Circuit affirmed the district court's ruling, although two members of the panel differed in their reasons.

The majority of the panel simply held that upon "review of the district court's findings and the record on appeal, we must agree with the district court and reject petitioner's claim of ineffective assistance of counsel." App. 7a. The third member of the panel, in a special concurring opinion, analyzed each of the allegations of ineffectiveness after finding that there was no need for an evidentiary hearing, since even if the state court hearing was insufficient, the issues raised could be resolved by reference to the existing record. App. 14a-16a.

On the question of ineffective assistance of counsel during the penalty phase, Judge Kravitch, stated:

> Under the standards set forth in Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B, 1982) (en banc); the failure of counsel to introduce the above evidence would, in my view, come close to ineffectiveness. However, even if ineffectiveness is assumed, the record shows the absence of any "actual and substantial disadvantage to the course of his defense." Id., at 1253. App. 16a.

In support of this conclusion, Judge Kravitch, stated:

> Under this court's analysis in Ford v. Strickland, 696 F.2d 804, 812, we now assume that arguments to the jury in the penalty phase will be considered by the jury as mitigating evidence even though the jury was never instructed that they could consider the underlying evidence on which those arguments are based. App. 16a.

Since counsel had argued the evidence of disparity of sentence to the jury, he "cannot claim to be prejudiced by virtue of the failure to introduce more evidence on the same point." App. 16a.

On the failure to call family members or on the fact of the previous brain surgery, Judge Kravitch ruled that since petitioner failed to demonstrate how these matters, assuming their ineffectiveness, disadvantaged the petitioner he had failed to meet his burden of proving "actual and substantial disadvantage" under Strickland, supra. App. 16a.

The court did not analyze the effect of the denial of a full and fair hearing claim as it related to the failure of petitioner to meet the three pronge test of Washington v.

(3) Petitioner's broad based challenge to the constitutionality of Florida Capital Punish- Statute which includes as an aggravating factor that "the capital felony was especially heinous atrocious and cruel", a factor which has been made unconstitutionally vague and overbroad by the Florida Supreme Court.

The trial judge's written findings in support of the death sentence indicate in pertinent part, App. 223a-227a, "4. The premeditated murder of Detective Sgt. Cloud was particularly a heinous, cruel and vicious crime." The trial judge provided no factual basis for his conclusion that this aggravating factor applied. (Tr 926-928). App. 223a-225a.

Nothing in the trial court record would support the finding that the murder was in fact heinous, atrocious and cruel.[5/] The testimony at trial relating how the murder occurred came from Marlowe Haskew, a co-defendant, who learned the information from Benjamin Gilford,

> Q. Marlowe Haskew, after Richard Cloud was killed, did you ever have a conversation with Buck or Benjamin Gilford concerning what happened when he went to the Cloud home?
>
> A. Yes. . . . He said, "when you let me out, I walked down to the house, in front of the house, and when I approached the house and knocked on the door," he said, "a man came to the door and I was in the process of asking him if Mr. Turner lived there." He said, I fired 3 or 4 shots through the door." And he said the man started to back away like he wasn't vitally hit and he said "I opened the door and went in." And he said, the man was reaching for a potted plant or ashtray or something and he said he threw it at him and he emptied the gun." (Tr 1497, 1498).

This factor was challenged on direct appeal to the Florida

5/ In State v. Dixon, 283 So.2d 1 (Fla. 1973), Florida's Supreme Court defined the term "especially heinous, atrocious and cruel" as follows: . . . it is our interpretation that heinous means extremely wicked and vile; and that, cruel menas designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the sufferings of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim. id, at 9.

Supreme Court. In examining this particular factor, the court stated, "Because of our recent decisions, there may be a question whether this is an appropriate aggravating circumstance." See, e.g., Cooper v. State, 336 So.2d 1133 (Fla. 1976). App. 32a.

The court further stated:

> Because we fully approve the first three aggravating circumstances and find no mitigating circumstances, it is not necessary to consider the appropriateness of the trial court's finding the murder was heinous, atrocious or cruel. An error in finding this aggravating circumstance does not invalidate the imposition of the death sentence. Elledge v. State, 346 So.2d 998 (Fla. 1977). . . . App. 32a.

In his petition for writ of Habeas Corpus, petitioner challenged the constitutionality of the Florida death penalty statute on the basis of the Florida Supreme Court's inconsistent and overbroad construction of this aggravating factor. App. 71a, 72a. The District Court denied relief.

In its Memorandum of Decision, the district court stated,

> The petitioner has also asserted that aggravating factor (h), i.e., that the crime was "especially heinous, atrocious or cruel", is void for vagueness and could not properly support imposition of the death sentence. If this had been the only aggravating factor found by the trial court, it would be necessary to consider the merits of the petitioner's "void for vagueness" argument. In this case, however, the Court found three other aggravating factors and no mitigating circumstances. Therefore, the unconstitutionality of this one aggravating factor would not invalidate the petitioner's death sentence. Accord, Antone v. State, 382 So.2d 1205, 1216 (Fla. 1980). App. 139a.

In his brief to the Eleventh Circuit, petitioner contended that though Florida's capital punishment statute, including this factor was initially upheld against an attack for vagueness and overbreadth, subsequent application and construction of the term by the Florida Supreme Court had rendered the factor vague and overbroad. Petitioner argued that the factor no longer channeled the sentencing decision of juries and no longer provided a meaningful basis for distinguishing those few cases in which a death sentence is imposed from the many

in which it is not, citing, Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976) and Godfrey v. Georgia, 446 U.S. 420 (1980). Petitioner, thus argued that the factor was unconstitutionally vague and overbroad and the sentencing could not stand. App. 228a-233a.

The Eleventh Circuit did not consider this broad based attack on the constitutionality of the heinous, atrocious and cruel factor. Instead, the court viewed the matter as one involving the invalidation on non-constitutional grounds of one of several aggravating factors in the absence of mitigating factors. Relying on its opinion in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc), the court declined "to engage in the collateral review of a factor upon which the affirmance of Antone's death sentence was not predicated." However, upon this issue the court remanded the case to the district court to consider the effect of the Supreme Court's ruling in Barclay v. Florida, supra, upon the petitioner's case. App. 6a. After the United States Supreme Court ruled on the issue, Barclay v. Florida, 103 S.Ct. 3418 (1983), the court substituted language from that opinion in its original opinion. In essence, the court ruled that the Florida Supreme Court was capable of evaluating the balance struck by the trial court and deciding "that the elimination of an improperly considered aggravating circumstance could not possibly affect the balance." App. 141a.

(4) Petitioner challenges the court of appeals ruling on a Brady v. Maryland, supra, issue as it relates to Eighth and Fourteenth Amendment issues concerning jury consideration of all relevant circumstances of the offense and aspects of the defendant's character during penalty phase of a first degree murder case.

After the shooting of Richard Cloud, a task force of local, state and federal law enforcement agents and prosecutors began investigating the murder. (RPC 140, 141). On February 20, 1976, members of this task force were contacted by a Robert Bruns. (RPC 204). Bruns was in jail at the time for contempt

of court. He contacted members of the task force and informed them that he had information regarding the Richard Cloud murder. (RPC 181, 182). Bruns informed the police that a Benjamin Gilford had been living with him during February 1976. In conversations with him, Gilford had admitted killing Cloud. (RPC 147, 169). Essentially, Gilford had admitted that he and a Marlowe Haskew had gone to Cloud's neighborhood; and that Gilford had gone up to Cloud's door and shot Cloud several times when he answered the door. (RPC 170). After giving this information to the police, Bruns was taken from jail. He agreed to cooperate with the police. As part of this cooperation, he was equipped with a body bug transmitter by the F.B.I. . (RPC 148, 220, 221). Bruns was instructed by the task force to get Gilford to talk about the murder. The police also instructed Bruns to find out more about an individual named "Anthony" who had previously been mentioned by Gilford as the person who had delivered the money after the shooting. (RPC 150, 152).

Benjamin Gilford was arrested on February 23, 1976. In his possession at the time of his arrest was an address book with the name "Anthony" and a phone number in it. A check of phone records indicated that the phone was for an Anthony Antone in Tampa, Florida. (RPC 213). Marlowe Haskew was arrested on February 25, 1976. Haskew agreed to cooperate and in a statement made to the police he implicated petitioner as a "go-between" on several "contracts" put out by a person named Victor Acosta. (Tr 276). Antone was identified as having supplied the murder weapon and money from Acosta for the killing. (Tr 284). Antone was arrested on the evening of February 25, 1976. (Tr 300).

An Indictment was returned against the petitioner on February 26, 1976. Subsequent to the filing of the murder charge, petitioner's trial counsel filed a demand for discovery under Florida Rule of Criminal Procedure 3.220. App. 234a-236a.

Among the demands made in this pleading were:

> 1. The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.
>
> 2. The statement, including police reports of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted or approved by him or stenographic, mechanical, electrical or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement.
>
> 13. Pursuant to RCrP 3.220(a)(2) and to the due process clause of the Fourteenth Amendment of the United States Constitution, any material or information within the State's possession or control which tends to negate the guilt of the defendant as to the offense charged, or to punishment, or to the credibility of the State's witnesses.

This demand for discovery was reviewed by the prosecutor and the prosecutor acknowledged that it contained a demand for Brady material. (RPC 225). The prosecution did not comply with these demands and never turned over the name of Robert Bruns to the petitioner's attorney. (RPC 226). The prosecution acknowledged the availability of Bruns and acknowledged that they were not trying to keep him as a confidential informant. (RPC 227). The prosecutor also indicated that it was a deliberate decision on his part not to reveal the name of Bruns to petitioner's attorney based on his opinion that Bruns was not relevant to petitioner's case, his testimony was inadmissible as to petitioner and he had no exculpatory information regarding the petitioner. (RPC 229).

At the hearing on petitioner's motion for post-conviction relief before the Circuit Court in and for Hillsborough County, Florida, Bruns testified that in his conversations with Gilford, Gilford indicated that he had actually shot the victim, and that Marlowe Haskew had supplied the gun and driven him to the scene to do the shooting. (RPC 171, 150). Gilford had indicated that petitioner was the man who had delivered the

money to Haskew. (RPC 150). Gilford further indicated that at the time he killed Cloud, petitioner didn't know about it. (RPC 151). Gilford also related to Bruns that "on the day after, following the killing, then, that Anthony was supposed to pay him and that when he found out, you know, about it, he wouldn't pay him; that he was scared to meet with him and he was really upset about the whole thing." Antone did not know of the killing until after the shooting. (RPC 153). Bruns indicated that after Gilford's arrest he was advised by the police to leave the state of Florida and Bruns in fact moved to North Carolina. Subsequently, he met with the prosecutor on two occasions to discuss the case. (RPC 154). Bruns also indicated that he never told anyone in law enforcement that Gilford had told him that Antone did not know anything about the Cloud murder until after it occurred. (RPC 162).[6/]

The trial court denied relief on this issue. The Florida Supreme Court accepted the trial court's findings that "the state did not have knowledge of Gilford's statement to Bruns regarding Antone's ignorance of Cloud's murder until after it occurred and his after-the-fact participation in paying the money." App. 47a. The court found no actual suppression of favorable evidence by the state and stated, "The law is clear that in the absence of actual suppression of favorable evidence, the prosecution does not violate due process by denying discovery." App. 47a.

The district court ruled that it was required to accept the factual findings of the trial judge, citing 28 U.S.C. §2254 (d). Based upon those facts, the court found that no Brady violation occurred. App. 122a, 123a.

6/ Robert E. Bruns' entire transcript of testimony is reproduced in the Appendix, pages 237a-281a.

The Eleventh Circuit also rejected the claim, although members of the panel gave different reasons for doing so. The majority opinion ruled that petitioner had "received a full and fair hearing in state court and the record fairly supports the state judge's decision. The state courts found that there was no suppression of evidence by the prosecution. This finding concludes the issue under 28 U.S.C. §2254 (d) and Sumner v. Mata, 449 U.S. 539 . . .". App. 7a. Judge Kravitch agreed with the disposition of the majority but could not join "its conclusory analysis of this issue." Judge Kravitch found that both the state courts and the federal district court misapplied Brady. In a detailed analysis of Brady, the judge ruled that it was immaterial whether the State prosecutors knew of Bruns' statement. They undeniably were aware of him. The judge acknowledged that the state courts had found the failure to disclose Bruns name to be a violation of state discovery rules and stated "the state's knowledge or assessment of the exculpatory or nonexculpatory nature of the evidence is irrelevant to the analysis of the type of case before us. Only the State's knowledge of the existence of material information, exculpatory or not, is relevant." Citing, United States v. Agurs, 427 U.S. 97 (1976), the judge ruled that petitioner had made a specific request for this information in his demand for discovery and the State was required to comply with it. In spite of the violation, the judge found that the error was excusable, based on her analysis of the trial testimony of the petitioner and the arguments of his counsel and based, in part, on a conclusion that Bruns' testimony was cumulative. Additionally, Judge Kravitch found the district court and the majority misapplied the dictates of 28 U.S.C. §2254 (d) and Sumner v. Mata, 449 U.S. 539 (1981), by not giving reasons why the hearing was full and fair, and why the record supports the finding at issue, and in not evaluating whether petitioner established by convincing evidence that the Government did suppress evidence favorable to the Government. App. 10a-14a.

REASON FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE PRINCIPLES OF PAYTON v. NEW YORK, SHOULD BE APPLIED RETROACTIVELY TO A CASE RAISING THE ISSUE FOR THE FIRST TIME ON COLLATERAL REVIEW OR WHETHER THE FEDERAL COURTS ARE BARRED UNDER STONE v. POWELL, FROM CONSIDERING THE PAYTON v. NEW YORK ISSUE.

The Court of Appeals for the Eleventh Circuit has ruled in petitioner's case that it is precluded from consideration of petitioner's Fourth Amendment claim based upon this Court's ruling in Stone v.Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). The Eleventh Circuit's ruling raises significant questions concerning the retroactive application of this Court's ruling in Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), to cases in which the issue is raised on collateral attack as well as the question of the application of the full and fair hearing requirements of Stone v. Powell. Petitioner submits that the Payton issue raised herein presents an important question of federal law, that this court has yet to answer. Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983); United States v. Johnson, ___ U.S. ___, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982).[7/]

Several courts within the various circuits have recently noted that the issue is one which remains to be settled by this Court. See, Scott v. Maggio, 695 F.2d 916 (5th Cir. 1983); United States v. Robinson, 690 F.2d 869 (11th Cir. 1982); Antone v. Strickland, supra; Cadena v. United States, 537 F.Supp. 384 (S.D.N.Y. 1982); McPhail v. Warden, Attica Correctional Facility, 539 F.Supp. 165 (S.D.N.Y. 1982).

Additionally, a review of various cases having a factual basis similar to the facts in petitioner's case indicate that there is a conflict on this issue within several of the circuit courts of appeals. In Crowell v. Zahradnick, 571 F.2d 1257 (4th Cir. 1977), which is an appeal of a denial of habeas corpus relief, the appellant argued that the admission of inculpatory statements at his trial violated his fourth amendment rights because the statements were a product of an illegal arrest. Based on the fact that petitioner's constitutional

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7/ See, Johnson, id. at p. 5944.

claim was raised for the first time in the federal courts of appeal from the dismissal of his petition for habeas corpus, the Fourth Circuit ruled that appellant had failed to exhaust State remedies and therefore the district court decision was affirmed. However, the Fourth Circuit gave no indication at all that Stone v. Powell would bar it from considering this Fourth Amendment claim. In fact, one judge in dissent urged that the court should consider the case on the merits.

In contrast to the Fourth Circuit's apparent willingness to review such a Fourth Amendment claim, several of the other circuits have announced decisions which indicate that the court of appeals is barred from review of such fourth amendment claims raised on collateral attack under the principles of Stone v. Powell, supra. In Morgan v. Estelle, 588 F.2d 934 (5th Cir. 1979), the petitioner filed a petition for writ of Habeas Corpus in the district court claiming that his arrest was illegal and that his confession was a result of his illegal arrest and should not have been admitted into evidence at his trial. The Fifth Circuit ruled that since petitioner had received a full opportunity to present his Fourth Amendment claim in state court, he was precluded from again asserting it in a habeas corpus petition under principles of Stone v. Powell, supra. (See also, Myers v. Rhay, 577 F.2d 504 (9th Cir. 1978), and Simmons v. Clemente, 552 F.2d 65 (2nd Cir. 1977), wherein the Ninth Circuit and Second Circuit, respectively, refused to grant habeas corpus review to Fourth Amendment claims, citing Stone v. Powell, supra.).

Although these cases predate this Court's decision in Payton and United States v. Johnson, supra, and are factually different from Payton, they do involve Fourth Amendment issues, similar to petitioner's being raised in habeas corpus proceedings. Although, Crowell v. Zahradnick, supra, does not expressly deal with the issue, petitioner believes that it is precedent for arguing a conflict within the circuits on this issue. This Court should grant Certiorari to finally resolve these issues.

In Payton v. New York, supra, this Court unequivocally established that "the Fourth Amendment to the United States

Constitution made applicable to the States by the Fourteenth Amendment to the United States Constitution . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." It is equally clear and undeniable that the task force of officers who arrested petitioner on February 25, 1976, did so in total violation of the Court's holding in Payton.

This Court's opinion in Payton was decided April 15, 1980. The Florida Supreme Court had denied petitioner's direct appeal on March 27, 1980. Rehearing was denied May 21, 1980. At the time of petitioner's arrest and during his appeal, Florida law allowed warrantless entries into homes to make felony arrests. No Payton type challenge was made by petitioner until he initiated collateral attack on his judgment and sentence.

Petitioner asserts that there are two aspects of this issue that this Court should review. The first is, the narrow issue of whether or not the Eleventh Circuit has improperly determined that this Court's ruling in Stone v. Powell precluded its review of the matter. In doing so, the court, of necessity, ruled that the petitioner had received a full and fair opportunity to litigate the issue in state court. Petitioner has maintained that this is simply not the case. Secondly, if, in fact, petitioner did receive a full and fair hearing, thereby bringing into play the principles of Stone v. Powell, this Court must decide whether those principles will preclude the federal courts on habeas corpus review, from reviewing an alleged Fourth Amendment violation under Payton v. New York, or whether petitioner's Payton claim may be retroactively applied even on collateral review and in spite of Stone v. Powell.

On the first point, petitioner has asserted that neither the district court nor the court of appeals are correct in this conclusion that petitioner had a full and fair opportunity to litigate his Fourth Amendment claim. Petitioner was foreclosed from litigating a Fourth Amendment issue in this case by the Florida Supreme Court's holding in State v.Perez, 277 So.2d 778 (Fla. 1973), which allowed the type of conduct that Payton later ruled illegal. Petitioner did challenge the voluntariness

of the statements by way of motion to suppress, however, no fourth amendment issue was raised. The reason for this is found in Perez v. State, supra. The rule in Perez had been law for several years in Florida prior to petitioner's arrest. See, Perez v. State, supra, at 781 (citing Reis v. State). Further, the Florida Supreme Court's review of applicable Federal law in its decision in Perez made it clear that Florida's position on this issue was not a justiciable issue in state courts.

The district court relied upon the fact that under Florida procedural rules, there was a mechanism for raising fourth amendment issues.[8/] Petitioner submits that the rule allowing for a motion to suppress simply cannot, under the circumstances here, be substituted or equated with the Stone v. Powell, requirement that petitioner have the opportunity for full consideration of the claim.[9/]

Numerous Circuit Courts have indicated a need for this Court to define the full and fair hearing requirement of Stone v. Powell; O'Berry v. Wainwright, supra, Petillo v. New Jersey, 562 F.2d 903 (3rd Cir. 1977). This Court should grant Certiorari to finally resolve the issue, cf., Shoemaker v. Riley, ___ U.S. ___, 103 S.Ct. 266 (1982) (dissent opinion by Justice White).

Should this Court rule that the principles of Stone v. Powell, are applicable under the circumstances of petitioner's case, the Court must also decide the difficult question of whether the petitioner is precluded under Stone v. Powell from asserting a violation of his Fourth Amendment rights under Payton v. New York, where the issue is raised on collateral attack. The issue regarding the retrospective application of Payton to claims arising on habeas corpus review, is ripe for review. United States v. Johnson, supra, at 102 S.Ct. at 2594.

8/ See, Memorandum of Decision. App. 117a-140a.

9/ Neither the trial court nor the Florida Supreme Court on direct appeal gave any consideration at all to the Fourth Amendment issue. When the issue was raised on collateral attack, the state courts ruled that Payton would not be applied retroactively.

In Johnson, id., the majority of this Court found that the history of retroactivity cases, at least those cases decided since Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), left no clear precedents to control the issues raised by the Court's decision in Payton v. New York. To resolve the retroactivity problem presented by Payton, the Court adopted Justice Harlan's approach suggested in his dissent in Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030 (1969) and in a separate concurring opinion in Mackey v. United States, 401 U.S. 675, 91 S.Ct. 1171 (1971). Adopting that approach, the majority of the court then ruled that Payton and indeed all Fourth Amendment decisions of this Court would be applied retroactively to all convictions that were not yet final at the time the decision was rendered. Johnson, supra, at 2594.

The Court in Johnson, as Justice Harlan did in Desist, supra, and Mackey, supra, recognized that the determination of the retrospective application of the new rule of law to habeas corpus proceedings presented substantially different and difficult questions. Under Justice Harlan's approach, the issue is to be decided based upon an inquiry into the purposes of habeas relief. Under Stone v. Powell, supra, additional considerations come into play when the issue sought to be raised involves fourth amendment issues raised on collateral attack. Additionally, whereas, Justice Harlan was exploring the purpose of the writ of habeas corpus as defined by this Court's decision in Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963), this Court must examine the matter with an eye toward the narrowed purpose of the habeas corpus writ under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

Petitioner believes that those factors which led to the Court applying Payton to those convictions not yet final, require that Payton be applied retroactively to his case even though the issue was first raised on collateral attack. Petitioner's conviction had been affirmed by the Florida Supreme Court, but was not yet final under Linkletter v. Walker, supra, at 622, n.5. Those considerations of finality and the purpose of the Exclusionary rule which underlie the Court's ruling

in Stone v. Powell, supra, should not apply to petitioner's case since his conviction had not reached a stage that could be labeled final. Petitioner no less than other similarly situated persons at the time of Payton, should not be barred from asserting either by direct appeal or habeas corpus petition, a clear constitutional violation.[10/] Petitioner believes that the resolution of the issue as it relates to his case, may well lay somewhere in the middle of a final resolution of the overall issue. However, petitioner believes that the Court should resolve these difficult issues by granting the writ and allowing full briefing on the matters raised.

II. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL BY COUNSEL'S FAILURE TO PRESENT EVIDENCE IN MITIGATION, BY COUNSEL'S FAILURE TO PRESENT OTHER MITIGATING CIRCUMSTANCES OUTSIDE THE STATUTORILY PRESCRIBED FACTORS, BY COUNSEL'S FAILURE TO ADEQUATELY OR EFFECTIVELY PRESENT ARGUMENT DURING THE PENALTY PHASE OR BY COUNSEL'S FAILURE TO REQUEST SPECIAL JURY INSTRUCTIONS TO CLEAR UP DEFICIENCIES IN THE STANDARD JURY INSTRUCTIONS.

This Court has repeatedly affirmed that which it stated in Woodson v. North Carolina, 428 U.S. 280, 304 (1976), that:

> We believe that in capital cases, the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and records of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death.

See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869 (1982); Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983). Petitioner's trial counsel failed to adequately develop or present evidence in mitigation at his sentencing hearing. Inexplicably, counsel did not put on the testimony of a single witness on behalf of the petitioner. The record of the sentencing hearing which occurred immediately upon the conclusion of the guilt phase

10/ Questions regarding procedural default under this Court's holding in Wainwright v. Sykes, supra, were not addressed by the lower courts and are not raised here.

reflects a complete lack of preparation and presentation of relevant mitigation. The prosecution introduced the only evidence admitted during the sentencing phase. This evidence consisted of petitioner's file from the Florida Department of Corrections, a file compiled during petitioner's previous incarceration for Robbery. The file was introduced and effectively argued by the prosecution to establish aggravating factors and to disprove mitigating factors. Trial counsel essentially stipulated the file into evidence. Apparently, this was done so that he could point out in argument, that petitioner had previously had brain surgery. This argument rang hollow during arguments however, as there was no way for counsel to draw any conclusions from the fact of surgery so that mitigation could be established.

The record is totally devoid of any attempt by counsel to establish a record in support of mitigation. Not even family members were called to talk about the petitioner's personal, familial and employment background.[11/] This evidence is clearly admissible under Florida and Federal law as non-statutory mitigating circumstances.

Trial counsel relied exclusively on closing argument to convince the jury that sufficient mitigating circumstances existed to warrant a recommendation of life. The prosecution's argument during the penalty phase presented the issue as one of counting aggravating versus mitigating factors. Clearly, it is not under Florida law, Dixon v. State, 283 So.2d 1 (Fla. 1973); Proffitt v. Florida, supra. Yet, trial counsel did nothing to counter this highly misleading argument. Instead

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11/ Judge Kravitch, in a special concurring opinion, denied relief on this issue in part because of the failure of habeas petitioner to present evidence which would establish how this ineffectiveness disadvantaged petitioner under Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B, 1982) (en banc). However, the record is clear that petitioner asked for additional time prior to the state court hearing so that counsel during collateral proceedings could take discovery and prepare and present evidence in support of the various issues. The trial court denied the request. Petitioner still maintains that he has been denied a full and fair hearing on this and other issues and that if given the opportunity, mitigating evidence could be established. Antone v. Strickland, supra, App. 16a.

trial counsel, showing a total lack of understanding of the law relating to mitigation, confined his argument to the statutory factors. Trial counsel never once informed the jury that the question of life or death was to be a weighing process rather than a counting process. Not once did trial counsel argue outside the statutory mitigating factors.[12/] Having failed to establish any factual basis in support of mitigation, counsel's argument was woefully inadequate to convince the jury on this issue.

Finally, counsel failed to request Special Jury Instructions which would have cleared up deficiencies in the Florida Standard Jury Instructions in use at his trial. Not only did both counsel indicate in their arguments that the jury was limited in its consideration of mitigating factors to those contained in the Statute, but the Standard Instructions also impliedly indicated this. For instance, the jury was never informed by the court that it could consider any other relevant aspect of petitioner's character or circumstances of the offense. Clearly, that was and to this day, remains the law. Lockett v. Ohio, supra. Trial counsel did nothing to assure that this principle was before the jury.

A reading of the entire penalty proceeding establishes a totally inadequate performance by trial counsel. It is also evident, that counsel's failure to prepare and present evidence in mitigation helped procure petitioner's death sentence. Both the trial judge and the Florida Supreme Court relied heavily on the finding of no mitigation to support the imposition of death. Subsequent challenges to the death penalty have also been thwarted by the judicial findings of lack of mitigating circumstances.

12/ Judge Kravitch found that at least one non-statutory mitigating factor had been argued. That factor dealt with the disparity of sentence between the co-defendant Haskew and the suggested death sentence for petitioner. App. 16a. The disparity of sentence was argued to the jury but only in an attempt to establish one of the statutory mitigating factors. It is evident that trial counsel was not even aware that he could argue any relevant aspect of petitioner's character or circumstance of the offense, regardless of the statutory list of mitigating factors. It is the total lack of understanding relating to the presentation of mitigation that petitioner objects to.

Finally, petitioner asserts that this is an issue of great importance to the federal judicial system and one which requires a decision from this Court. The Court has granted certiorari in two cases presenting the question of the standards to be applied in determining effective assistance of counsel both at an ordinary criminal trial, United States v. Cronic, No. 82-660, cert. granted, ___ U.S. ___, 51 U.S.L.W. 3611 (Feb. 22, 1983), and at the sentencing phase of a capital case. Strickland v. Washington, No. 82-1554, cert. granted, ___ U.S. ___, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (June 6, 1983). The Court should grant the writ and determine whether petitioner was denied the effective assistance of counsel in light of the standards to be set in Cronic and Strickland v. Washington.

III. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER IN THE APPLICATION OF THE ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING FACTOR TO PETITIONER'S CASE, THE STATE OF FLORIDA HAS USED SUCH A VAGUE AND OVERBROAD CONSTRUCTION OF THE FACTOR THAT THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED.

In imposing the sentence of death on the petitioner, the trial judge found four statutory aggravating factors and no mitigating factors. In significant part, the court based the sentence upon its finding the crime was "especially heinous, atrocious, and cruel". In reviewing the death sentence, the Florida Supreme Court affirmed the judgment and sentence, but stated, "Because of our recent decisions, there may be a question whether this is an appropriate aggravating circumstance." App. 32a.

Petitioner has repeatedly challenged both the application of the factor to his case and the vague, overbroad and outright inconsistent judicial construction given to this factor by the Florida Supreme Court. The lower federal courts have failed to address this issue. Although the issue was briefed in these terms, the Eleventh Circuit, reviewed the matter as not involving a question of an unconstitutionally vague statutory factor, but instead involving only a question of the improper application of a statutory aggravating factor on non-constitutional grounds. App. 6a. Contrary to this holding by the Eleventh Circuit,

the question raised deals precisely with the application of an unconstitutionally vague and overbroad aggravating factor.

As petitioner will establish, the "especially heinous, atrocious and cruel" aggravating factor was improperly applied to his case. This occurred because the Florida Supreme Court's inconsistent interpretation of the meaning and scope of the factor has resulted in a vague and overbroad aggravating factor that might literally apply to every single premeditated murder committed in Florida.

This Court has recently reaffirmed that it is a fundamental requirement that a state's "aggravating factors" and indeed each statutory aggravating factor must satisfy constitutional standards as set out in Furman v. Georgia, 408 U.S. 241, 92 S.Ct. 2726 (1972). The reason for this is the recognition that a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found in Furman could occur." (Citing Gregg v. Georgia, 428 U.S. at 195 n. 46). Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2742 (1983).

In order to avoid this constitutional defect, this Court stated;

> An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Zant v. Stephens, id., at 2742, 2743.

Florida's "heinous, atrocious and cruel" aggravating factor as construed and applied does not satisfy constitutional standards.

The "especially heinous, atrocious and cruel" factor was inappropriately applied to petitioner. In upholding the constitutionality of Florida's capital punishment scheme, this Court accepted the factor on the basis of the limited definition given to the factor by the Florida Supreme Court in State v. Dixon, 283 So2d 1 (Fla. 1973). Proffitt v. Florida, 428 U.S. 242 (1976). In Dixon, the court stated,

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies . . .

By this constitutionally acceptable definition, the aggravating factor did not apply to petitioner's case. Here the victim died quickly as the result of several gunshot wounds. There was no evidence of torture, or the extraordinary infliction of pain or suffering upon the victim. See, Cooper v. State, 336 So.2d 1133 (Fla. 1976); Fleming v. State, 374 So.2d 954 (Fla. 1979); Kampff v. State, 371 So.2d 1007 (Fla. 1979). Compare with, Gardner v. State, 313 So.2d 675 (Fla. 1975); Adams v. State, 412 So.2d 850 (Fla. 1982); Thompson v. State, 389 So.2d 197 (Fla. 1980).

The evidence in this case establishes a homicide that is not "accompanied by such additional acts as to set the crime apart from the norm of capital felonies." See, Dixon, supra. Similar to this Court's holding in Godfrey v. Georgia, 446 U.S. 420 (1980), here there is no 'principaled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." id at 433.

To support this aggravating factor, the trial judge simply stated, "The premeditated murder of Det. Sgt. Cloud was particularly a heinous, cruel and vicious crime." No where is the Dixon standard acknowledged. The fact of premeditation is found or presumed to be present[13/] in every first degree murder under Florida law. If premeditation in and of itself is sufficient to make the murder "especially heinous, atrocious or cruel," then virtually every first degree murder would be eligible for the death penalty under this aggravating factor.

This is not simply a problem of the trial judge misapplying

13/ First degree murder is committed either (a) from a "premeditated design to effect the death of another" or (b) by committing the murder during the commission of certain enumerated felonies, i.e., felony murder. See, Chapter 782.04(1) Florida Statute 1975. Under Florida law of felony murder premeditation or "malice aforethought" is supplied by the commission of the felony. Adams v. State, 341 So.2d 765 (Fla. 1976); Jacobs v. State, 396 So.2d 1113 (Fla. 1981). Thus premeditation exists either actually or constructively in every first degree murder.

a factor. A review of Florida Supreme Court decisions dealing with this type of finding shows an indefensible inconsistency that has left this factor so vague and overbroad that it no longer acts to channel jury discretion.[14/]

The "especially heinous, atrocious and cruel" aggravating factor has generated a volume of confusing and unintelligible law in other factual contexts as well.[15/]

14/ On the relationship between premeditation and this aggravating factor, the Court has not reached consistent results. Compare, Harvard v. State, 414 So.2d 1032, 1033, 1036 (Fla. 1982) (defendant "stalked" and harassed his ex-wife after their separation; homicide itself was committed by a single shotgun blast at ex-wife while she was in a car, death was instantaneous, with no evidence that she was aware of danger when killed; trial court's finding of "heinous, atrocious or cruel" circumstance based on fact that crime was premeditated, calculated and "a cold-blooded execution" upheld) with Kampff v. State, supra, 371 So.2d at 1008, 1010 (defendant and wife were separated three years; defendant harassed her throughout the period; the homicide was committed by five shots at victim in a store, three of which struck and killed her; held, "heinous, atrocious or cruel" circumstance was not applicable). Compare, Vaught v. State, 410 So.2d 147, 148, 151 (Fla. 1982) (robbery victim exposed defendant's face, defendant shot him five times; held, "heinous, atrocious or cruel" circumstance was applicable because the murder was "inflicted in a cold, calculating, or 'execution-style' fashion") with, Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979) (robbery victim shot twice while arms were raised in submissive position; held, "there is nothing to set this execution murder 'apart from the norm of capital felonies'"). Compare, McCray v. State, 416 So.2d 804, 805, 807 (Fla. 1982) (defendant, angered by victim's actions during robbery, approached him and said, "This is for you motherf---er", then shot him three times; held, "heinous, atrocious or cruel" circumstance was not applicable); with Johnson v. State, 393 So.2d 1069, 1071, 1073, 1074 (Fla. 1980) (defendant angered by fact that victim had shot at him during robbery, walked up to victim when victim ran out of bullets and said, "You think you're a smart son-of-a-bitch, don't you?" then shot him once in the chest; held, "heinous, atrocious or cruel" applicable to this "execution murder.").

15/ In some cases with factual basis that seem to fall squarely within the statutory definition, the Florida Supreme Court has nonetheless rejected the factor. For example, see, Swan v. State, 322 So.2d 485 (Fla. 1975), where the victim was found "in a semiconscious condition on the floor of the home, badly bruised and beaten. Her hands, neck and left foot were tied so that any efforts she might have made to free herself could have choked her to death." She was tied up and her mouth was gagged. As a result of the severe beating, she died. The trial court found the murder "outrageously wicked, vile, atrocious, cruel and heinous." The Florida Supreme Court reversed the sentence of death; see, Halliwell v. State, 323 So.2d 557 (1975), where the defendant savagely and repeatedly beat the victim with a nineteen inch breaker bar, thereby causing the death of the victim. After killing the victim, the defendant dismembered the body and concealed the pieces to be later disposed of. The trial court found the murder heinous, atrocious and cruel. The Florida Supreme Court reduced the death sentence to life imprisonment.

In other cases, with seemingly identical facts, the Florida Supreme Court has provided inconsistent rulings. For instance,

In some cases, such as petitioner's, the Florida Supreme Court appears incapable of making up its own mind on the issue. A good illustration of this is Raulerson v. State. In Raulerson, a police officer who was investigating a robbery in progess was shot and killed by the defendant. The trial court found the crime heinous, atrocious and cruel. The death sentence and in particular, this factor, was upheld on direct appeal to the Florida Supreme Court. Raulerson v. State, 358 So.2d 826 (Fla. 1978). Raulerson subsequently sought post-conviction relief. When the case was again reviewed by the Florida Supreme Court, the court changed its collective mind and its earlier ruling and found that the crime was not heinous, atrocious or cruel. Raulerson v. State, 420 So.2d 567 (Fla. 1982).

The heinous, atrocious and cruel aggravating factor, no longer can satisfy the standards that this Court has established for aggravating factors. Furman v. Georgia, supra; Gregg v. Georgia, supra; Zant v. Stephens, supra. As so construed, it provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See, Proffitt v. Florida, 428 U.S. 242, at 256.

Petitioner submits that the application of this unconstitutionally vague aggravating factor to his case resulted in prejudice when it is considered in light of his earlier argument that there existed mitigating circumstances in his case, which should have been presented to the trial jury and judge. Under Florida's death penalty scheme, the sentencer must weigh the aggravating and mitigating factors in arriving on a sentence. See, Proffitt v. Florida, supra at 249-251. Where as here, the sentencer

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15/ continued. Compare, Riley v. State, 366 So.2d 19 (Fla. 1979), where defendant and another entered a store to rob the owner. Three persons were inside the store. All three were threatened with guns, bound and gagged and forced to lie on the floor. They then were each shot in the head. Two of the victims were killed. Although the trial judge found the murder heinous, atrocious and cruel, the Florida Supreme Court rejected the finding and remanded the case for resentencing; with Gibson v. State, 351 So.2d 948 (Fla. 1977), where the defendant and another by a prearranged plan, robbed two sailors who were out for a night on the town. One victim begged not be shot and the defendant shot him twice in the head, the other person was also shot but survived. The Florida Supreme Court accepted the trial court's finding that the murder was heinous, atrocious and cruel and affirmed the sentence of death.

relied upon the unconstitutionally vague factor, the sentence should be overturned, as there is no way to determine from judicial hindsight, what part the unconstitutional factor played in the balancing process which led to the sentence of death.

Petitioner is not unmindful of this Court's rulings in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418 (1983) or Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983), however, petitioner does not believe either case is controlling here. In the Barclay case, the issue concerned the improper application of non-statutory aggravating factors. The question in petitioner's case is the improper application of an unconstitutionally vague statutory aggravating factor. Petitioner's case thus is more closely related to Zant v. Stephens, id.

The Court in Zant v. Stephens, id at 2750, specifically stated;

> That in deciding this case we do not express an opinion concerning the possible significance of a holding that a particular aggravating circumstance is invalid under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the sentence of death.

That is precisely the function which the trial judge must undertake under Florida law.

Further, it should be no consolation that Florida procedure requires automatic review. On this issue, the Florida Supreme Court's record reveals that it has been incapable of even arriving at a consistent application of the especially heinous, atrocious and cruel factor. Contrary to the majority conclusion in Barclay, supra, petitioner asserts that the Florida Supreme Court cannot "examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance." Barclay, supra at 3445.

Florida's statutory death penalty scheme is infected by an unconstitutionally vague and overbroad aggravating factor. The absolute pervasiveness of this factor when coupled with the Florida Supreme Court's inability to effectively limit its construction requires that a death sentence imposed in reliance

IV. WHETHER THE FAILURE OF THE STATE TO COMPLY WITH THE REQUIREMENTS OF BRADY v. MARYLAND, AND UNITED STATES v. AGURS, BY FAILING TO DISCLOSE THE EXISTENCE OF A RELEVANT WITNESS THEREBY PRECLUDING PETITIONER FROM HAVING A WITNESS TO TESTIFY IN THE PENALTY PHASE OF HIS CAPITAL TRIAL AS TO THE CIRCUMSTANCES OF THE OFFENSE DENIED PETITIONER HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

As set out above, the State was aware of the existence of one Robert Bruns at least six months prior to petitioner's trial. Through a deliberate decision of the prosecution, the witness's name was not disclosed to petitioner's trial counsel. Bruns possessed relevant information regarding petitioner's position in crime scheme.16/

The Court in Brady v. Maryland, 373 U.S. 220, 83 S.Ct. 1194 (1963), held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . ." id at 87.

In the Eleventh Circuit, the majority found that the State courts had held an evidentiary hearing and concluded that there had been no actual suppression of favorable evidence by the State. The majority agreed with the district court that petitioner could not overcome the presumption of correctness in 28 U.S.C. §2254 (d) and that the matter was concluded under 2254 (d) and Sumner v. Mata, 449 U.S. 539 (1981).

Petitioner submits that the majority totally misapplied §2254 (d) and Sumner v. Mata, id. Petitioner agrees with the analysis of the issue made by Judge Kravitch in her special concurring opinion, but believes that the conclusions drawn therein are incorrect. In brief, Judge Kravitch found that the state courts and the district court had misapplied Brady in that they had relied upon a finding that the prosecutor had not had knowledge of the specific contents of the witness's statement and that therefor there was no knowing suppression of exculpatory evidence. However, applying Brady and United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976), Judge Kravitch

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16/ The transcript of Bruns' testimony at the hearing on petitioner's motion for post-conviction relief is set out in full in the Appendix. App. 237a-281a.

concluded that the prosecutor's culpability or knowledge of the exculpatory nature of the statement was irrelevant because there had, in fact, been a specific demand by the petitioner for this witness and the substance of the witness's statement. Applying the principles of Agurs, the court concluded that this type of Brady violation had occurred in Petitioner's case. In spite of this finding that Brady was violated, Judge Kravitch ruled that the failure to disclose was excusable under her analysis of the defense put on by petitioner both in the guilt and penalty phase of his trial.

Petitioner believes that Judge Kravitch has correctly analyzed the facts viz a viz §2254 (d) and Sumner v. Mata, and has correctly determined that the majority misapplied 28 U.S.C. §2254 (d) and Sumner v. Mata, supra, by holding that the issue is "concluded" because petitioner was unable to overcome the presumption of correctness. However, neither §2254 (d) nor Sumner v. Mata, supra, precluded the court from deciding the legal issue raised by the petitioner, and where as here, the state courts have misapplied the federal constitutional law, the federal courts must make their own independent analysis of the proper application of the constitution or the law to the facts in question. Sumner v. Mata, 449 U.S. at 543, 544.

While petitioner accepts Judge Kravitch's findings with regards to the Brady violation, petitioner disagrees with the conclusion that it is excusable. Per Agurs, supra, where it has been determined that a Brady violation exists and that a defendant has made a specific demand for exculpatory evidence, the issue becomes whether the "suppressed evidence might have affected the outcome of the trial." Agurs, 427 U.S. at 104. In Brady, the Court made it clear that its decision applied not only to nondisclosures affecting the guilt phase of the trial and but also to those nondisclosures affecting the punishment phase of the trial as well.

Petitioner has acknowledged that because of questions regarding the admissibility of Bruns' statement during the guilt phase, the nondisclosure had no bearing. However, it is clear that Bruns' statement, albeit hearsay, was admissible during the

penalty phase of petitioner's trial and could have been offered as substantial mitigating evidence had the petitioner known of the existence of the witness.

In determining whether this witness and evidence might have affected the outcome of the penalty phase of the trial the Court must be guided by its rulings in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982).

In Lockett, id at 604, the Court concluded that;

> The Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Thus, in Lockett, the Court struck down an Ohio statute which it determined precluded the sentencer from making these considerations.

In Eddings v. Oklahoma, supra, the Court, citing Lockett, overturned a sentence of death where the trial judge, ruled as a matter of law, that he was precluded from considering relevant mitigating evidence proffered by the appellant. As the Court stated, "The sentencer and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But, they may not give it no weight by excluding such evidence from their consideration."

Petitioner questions whether it is any less a violation of the Eighth and Fourteenth Amendments where the State of Florida, by the act of its prosecutor, has effectively precluded him from proffering a witness and evidence in mitigation of sentence. Petitioner submits it is not. By this act, the sentencer is just as surely deprived of consideration of a relevant mitigating circumstance of the offense, as it is when a statute precludes such consideration, or the court on its own, as a matter of law, declines to give any consideration.

Petitioner further submits that if it is such an Eighth and Fourteenth Amendment violation, then it is per se prejudicial

and the sentence of death must be reversed. It is not for the federal courts to speculate, as Judge Kravitch did in denying petitioner relief, that this violation would have had no bearing on the outcome of the penalty phase. As this Court stated in Eddings v. Oklahoma, supra, "On remand the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them."

Petitioner's sentence was imposed through a process which denied the sentencer consideration of a relevant mitigating witness. Under the principles of Woodson v. North Carolina, supra; Lockett v. Ohio, supra; and Eddings v. Oklahoma, supra, the petitioner's Eighth and Fourteenth Amendment rights have been violated. If the Court's previous admonitions regarding reliability in capital sentencing are to have any meaning, the writ should be granted.

CONCLUSION

For the reasons expressed herein, the petition for a writ of certiorari should be granted.

DATED this 24 day of October, 1983.

Respectfully submitted,

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No. 83-5644

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

ANTHONY ANTONE,

Petitioner,

-v-

CHARLES G. STRICKLAND, JR., Superintendent, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida; JIM SMITH, Attorney General, State of Florida,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, ANTHONY ANTONE, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. By separate mailing, Petitioner will provide this Court with an affidavit in substantially the form presecribed by Federal Rules of Appellate Procedure, Form 4, and the Rules of this Court, establishing his indigency.

Respectfully submitted,

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Attorney for Petitioner Antone

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TOM McCOUN, ESQUIRE

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BY: _____
PATRICK DOHERTY, ESQUIRE

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IN THE

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ANTHONY ANTONE,

Petitioner,

-v-

CHARLES G. STRICKLAND, JR., Superintendent, Florida State Prison; LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida; JIM SMITH, Attorney General, State of Florida,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED ON PETITION FOR A WRIT OF CERTIORARI IN FORMA PAUPERIS

I, ANTHONY ANTONE, being first duly sworn, depose and say that I am the Petitioner in the above-entitled cause; that in support of my motion to proceed on Petition for a Writ of Certiorari without being required to prepay fees, costs or given security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that at all stages of these proceedings, I have been allowed to proceed in forma pauperis.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the Petition for a Writ of Certiorari are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   Incarcerated for the last eight years.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? no.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? no.

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? no

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support None and state your relationship to those persons.

6. I am a death-sentenced prisoner confined to Florida State Prison, Starke, Florida. I have no other source of income nor property as set out herein.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Anthony Antone
ANTHONY ANTONE, Petitioner

Subscribed and sworn to before me this 24 day of October, 1983.

J. W. Warren
NOTARY PUBLIC
My Commission Expires: [illegible]

NO. 83-5644

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT U.S.

ANTHONY ANTONE,

Petitioner,

-v-

CHARLES G. STRICKLAND, JR., Superintendent, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida; JIM SMITH, Attorney General, State of Florida,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX

APPENDIX

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ORDER

Submission of this appeal was deferred pending the decision of the United States Supreme Court in *Illinois v. Abbott & Associates, Inc., et al.*, 639 F.2d 900 (7th Cir. 1981), *aff'd*, — U.S. —, 103 S.Ct. 1356, 75 L.Ed.2d 281, 1983.

Pursuant to that decision, which overruled our contrary holding in *United States v. B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir.1980), upon which the district court relied in this case, and based upon the joint request of appellants and appellees, the decision of the district court is REVERSED.

This proceeding is remanded to the district court with instructions to (1) conduct further proceedings, if appropriate, to determine whether or not a "particularized need" exists for the closed antitrust files, or (2) to dismiss without prejudice to the filing of a subsequent proceeding for disclosure, pursuant to Rule 6(e), Fed.R.Crim.P., upon a showing of compelling and particularized need, and (3) any further proceedings or dismissal shall include appropriate terms and conditions relating to the preservation of certain documents produced for the grand jury by various intervenors and by two other parties who were not notified of the commencement of this proceeding in the district court.

Each side shall bear its own costs.

The mandate shall issue forthwith.

IT IS SO ORDERED.

Anthony ANTONE, Petitioner,

v.

Charles STRICKLAND, Superintendent, Florida State Prison, Louie L. Wainwright, Secretary Florida Department of Offender Rehabilitation, and Jim Smith, Attorney General, State of Florida, Respondents.

No. 82-5128.

United States Court of Appeals, Eleventh Circuit.

June 13, 1983.

Petitioner appealed from denial by the United States District Court for the Middle District of Florida, George C. Carr, District Judge, of habeas corpus relief. The Court of Appeals, Fay, Circuit Judge, held that: (1) consideration of merits of claim concerning jury instruction on mitigating factors was barred; (2) federal court intervention was not warranted on claim that Florida death penalty statute was unconstitutional as applied; (3) claim challenging Florida Supreme Court's practice of receiving non-record information in connection with review of capital cases was precluded by a decision of that court; (4) petitioner failed to overcome presumption of correctness of state court's finding that there was no suppression of evidence by prosecution; (5) defendant was not denied ineffective assistance of counsel at voir dire and penalty phase of his trial; (6) argument that prosecutor impermissibly peremptorily challenged prospective juror was not supported by the facts; and (7) court was precluded from considering claim challenging petitioner's warrantless arrest.

Affirmed and remanded.

Kravitch, Circuit Judge, concurred specially and filed opinion.

1. Criminal Law ⇐822(1)

In determining whether a jury instruction is erroneous, entire charge must be examined to determine whether issues and law presented were adequate.

2. Habeas Corpus ⇐39(1)

Court of Appeals was barred from considering merits of habeas corpus petitioner's claim concerning jury instruction on mitigating factors in capital murder case since petitioner had not shown that jury was denied use of any nonstatutory mitigating factors in deciding to recommend death penalty and failed to advance sufficient cause for failure to object to the instructions at trial.

3. Habeas Corpus ⇐39(3)

Habeas corpus petitioner who contended that Florida death penalty statute was unconstitutional as applied in his case failed to show that the facts were so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience such as would warrant federal court intervention. 28 U.S.C.A. § 2254.

4. Habeas Corpus ⇐45.1(4)

In light of state court's conclusion that an error in finding challenged aggravating circumstance would not invalidate imposition of death sentence, Court of Appeals, in habeas corpus proceeding, declined to engage in collateral review of the aggravating factor upon which affirmance of death sentence was not predicated.

5. Habeas Corpus ⇐45.1(4)

Florida Supreme Court's statement that nonrecord information did not affect judgment of reviewing judges in capital cases foreclosed petitioner's habeas corpus claim.

6. Habeas Corpus ⇐85.1(2)

Habeas corpus petitioner failed to overcome presumption of correctness of state court's finding that there was no suppression of evidence by prosecution. 28 U.S.C.A. § 2254(d).

7. Habeas Corpus ⇐85.5(11)

Evidence failed to sustain petitioner's claim that he was denied effective assistance of counsel at voir dire and penalty phase of his trial.

8. Habeas Corpus ⇐35.1(4)

Separate and sufficient reason for state to exercise peremptory challenge against prospective juror in capital murder case precluded Court of Appeals' consideration of merits of petitioner's claim that prosecutor impermissibly challenged prospective juror on basis that juror had voiced some scruples against imposing death penalty.

9. Habeas Corpus ⇐45.1(4)

State provided petitioner with full and fair opportunity to litigate, in state courts, claim challenging his warrantless arrest and, consequently, federal court was precluded from considering the claim on petition for writ of habeas corpus.

Thomas B. McCoun, III, Louderback & McCoun, St. Petersburg, Fla., for petitioner.

Charles Corces, Jr., Asst. Atty. Gen., Tampa, Fla., for respondents.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY and KRAVITCH, Circuit Judges, and YOUNG,* District Judge.

FAY, Circuit Judge:

Anthony Antone, convicted of first degree murder and upon a recommendation of the jury in accordance with Fla.Stat. Section 921.141 (1974), sentenced to death, filed a petition for writ of habeas corpus in the United States District Court pursuant to 28 U.S.C. Section 2254. The district court denied the relief requested. On appeal, Antone advances six contentions: 1) that the judgment and sentence of death is contrary to the Eighth and Fourteenth Amendments; 2) that the Florida Supreme Court in reviewing petitioner's sentence unconstitutionally considered extra-record material; 3) that the prosecutor's nondisclosure of a witness and statement violated the Sixth

* Honorable George C. Young, U.S. District Court Judge for the Middle District of Florida, sitting by designation.

and Fourteenth Amendments; 4) that petitioner was denied effective assistance of counsel during the voir dire and penalty phase of the trial; 5) that the prosecutor's exclusion of death scrupled jurors was unconstitutional; and 6) that petitioner was arrested in violation of his Fourth Amendment rights. After consideration of Antone's contentions, we affirm, but remand to the district court to consider the effects of a pending United States Supreme Court decision.

The evidence upon which Antone was convicted and sentenced showed that petitioner arranged the contract murder of Richard Cloud, a former City of Tampa Police Detective. Antone provided the murder gun, test fired it into a couch in his home, specially equipped it, and disposed of the gun after the murder. Antone also paid $1,500 "front money" before the murder and between $7,000 and $8,000 after the murder.

After Antone's conviction and sentence of death on August 27, 1976, he appealed to the Florida Supreme Court which remanded the case to the trial court to determine whether there had been a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).[1] *Antone v. State*, 355 So.2d 777 (Fla.1978). After a hearing, the trial court determined that there had not been a *Brady* violation. On March 27, 1980, the Florida Supreme Court affirmed petitioner's conviction and sentence. *Antone v. State*, 382 So.2d 1205 (Fla.1980). The United States Supreme Court denied a petition for writ of certiorari. *Antone v. State*, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980).

The Governor of Florida signed a Death Warrant requiring petitioner's execution. Petitioner then filed two motions for post conviction relief in the Circuit Court for Hillsborough County, Florida. The court held an evidentiary hearing and denied the motions. The petitioner appealed to the Florida Supreme Court which affirmed the denial of the motions, denied a motion for stay of execution and petition for error coram nobis. *Antone v. State*, 410 So.2d 157 (Fla.1982).

Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. The district court denied the petition but granted a stay of execution pending appeal. We remanded the case back to the district court requesting more complete findings of fact and conclusions of law. The district court entered its Memorandum of Decision on February 18, 1982.[2]

I. IMPOSITION OF THE DEATH SENTENCE

A. JURY INSTRUCTIONS ON MITIGATING FACTORS

During the penalty phase of Antone's trial, the state trial judge, without objection from either party, instructed the jury on aggravating factors, and then stated "the mitigating factors which you may consider are these ...." and listed the seven mitigating factors enumerated by Fla.Stat. Section 921.141 (1975).[3] Petitioner now argues

1. The *Brady* issue considered by the state court concerned the payment of attorneys' fees for a co-defendant and is not the *Brady* issue raised by the petition for habeas corpus.

2. We have been holding this matter in abeyance pending this court's *en banc* resolution of *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc).

3. The seven mitigating factors as read by the state trial judge to the jury were: 1) that the defendant has no significant history of prior criminal activity; 2) that the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance; 3) that the victim was a participant in the defendant's conduct or consented to the act; 4) that the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor; 5) that the defendant acted under extreme duress or under the substantial domination of another person; 6) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; and 7) the age of the defendant at the time of the crime.

that this instruction impliedly limited the jury's consideration of mitigating circumstances in contravention of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Relying on *Washington v. Watkins*, 655 F.2d 1346 (5th Cir.1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982), petitioner contends that the jury was effectively precluded from consideration of any non-statutory mitigating factors.

Antone did not object to the jury instruction at trial or on direct appeal. Florida Rules of Criminal Procedure, Rule 3.390(d) (1973) specifically provided that jury instructions must be objected to before the jury retires to consider its verdict. The state therefore argues that Antone is in procedural default and that federal court consideration of the jury instruction in a habeas corpus proceeding is barred by *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In *Sykes*, the United States Supreme Court held that a state prisoner must demonstrate "cause and prejudice" in order to advance in a federal habeas corpus proceeding a claim barred from consideration by a valid state procedural rule. The Supreme Court recently reaffirmed this principle in *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), stating that "any prisoner bringing a constitutional claim to the federal courthouse after state procedural default must demonstrate cause and actual prejudice before obtaining relief." 456 U.S. at 129, 102 S.Ct. at 1572.

Antone argues that he was excused from objecting at trial because the law at that time indicated that only statutory mitigating circumstances could be considered and *Lockett v. Ohio* was two years away. Antone's argument that counsel could not reasonably be expected to anticipate the problems of *Lockett* is undermined by trial counsel's motion to dismiss the indictment which addressed the mitigating factors argument.[4] Further, the "futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial." *Engle v. Isaac*, 456 U.S. at 130, 102 S.Ct. at 1572.

[1] Apart from the question of cause, petitioner must also make a showing of prejudice. Prior to *Wainwright v. Sykes*, the Supreme Court stated that

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned.'"

Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977).[5] (citations omitted). In making such a determination, the entire charge to the jury must be examined to determine whether the issues and law presented to the jury were adequate. *Davis v. McAllister*, 631 F.2d 1256, 1260 (5th Cir.1980), *cert. denied*, 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409 (1981).

Antone has not established that the jury perceived that in deciding whether to recommend death it was denied consideration of any nonstatutory mitigating factors. On this appeal, Antone advances two nonstatutory mitigating factors which could have been considered by the jury: disparity of sentences between the codefendants and the effects of brain surgery upon the defendant. Petitioner's counsel did argue to

4. Paragraph 13 of the Motion to Dismiss the Indictment filed by Antone's counsel states as grounds for a dismissal of the indictment that: "By limiting the circumstances in mitigation as delineated in F.S. Section 921.141, the Statute provides for cruel and/or unusual punishment in violation of the Eighth and Fourteenth Amendment ..."

5. In her concurring opinion, Judge Kravitch objects to the citation of *Henderson v. Kibbe*, and would apparently rely solely on *Lockett*. However, Antone has argued this issue in the nature of a two prong attack and we have attempted to review it as such. We are aware of no Supreme Court authority indicating to the contrary.

the jury the "justice" of one codefendant plea bargaining for a thirty-five year sentence and another defendant, petitioner, being sentenced to death. There was nothing in the jury instructions that precluded the jury from considering this fact. As to the brain surgery, *Lockett* concerns any factor that "the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604, 98 S.Ct. at 2965. Brain surgery was not proffered at trial,[6] but even if it had been, the jury would not have been precluded from considering it by the court's instructions.[7]

[2] Antone has not shown that the jury was denied the use of any nonstatutory mitigating factors in deciding to recommend the death penalty and thus the actual prejudice test is not met. Further, Antone has not advanced sufficient cause for the failure to object to the instructions at trial. Therefore, *Wainwright v. Sykes* bars our consideration of the merits of Antone's claim concerning the jury instruction on mitigating factors.

B. DISPARITY IN SENTENCING

Antone relates that of the four persons shown to have been involved with the murder of Richard Cloud only one, petitioner, received the death penalty.[8] Based on this, Antone contends that the Florida death penalty statute is unconstitutional as applied in this case.

In adopting the jury's recommendation of death, the trial court found that petitioner was "the most major and by far the dominant participant, the master criminal mind and mover of the entire plan and sorted [sic] act." (R. State Proceedings, Vol. VII at 928.) On direct appeal, the Florida Supreme Court found that petitioner was "the mastermind of this operation. He supplied the gun, paid the money from his pocket, and pressured Haskew to complete the task. His participation cannot, under any view of this record, be termed minor. Without Antone's participation, the murder would not have come to fruition." *Antone v. State*, 382 So.2d 1205, 1216 (Fla.1980).

[3] It is not the role of the federal courts in Section 2254 proceedings to retry the circumstances contributing to the state's imposition of the death penalty. *Spinkellink v. Wainwright*, 578 F.2d 582, 605 (5th Cir.1978). Only if a petitioner can show "that the facts of his case are so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience" might federal court intervention be warranted. *Id.* at 606 n. 28. Petitioner Antone has made no such showing.

C. THE AGGRAVATING FACTOR "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL"

Antone contends that the heinous, atrocious and cruel aggravating factor is, as now construed, unconstitutionally vague and overbroad. The state trial judge found that the murder of Richard Cloud was "particularly a heinous, cruel and vicious crime," (R. State Proceedings, Vol. VII at 927), but did not elaborate. On appeal, the Florida Supreme Court stated that there "may be a question" as to whether heinous, atrocious and cruel was an appropriate aggravating circumstance in petitioner's case. *Antone v. State*, 382 So.2d 1205, 1216 (Fla.1980). The court, however, concluded that because it approved of the other three aggravating

6. Counsel, however, did mention an injury to Mr. Antone's head and suggested that the jury read about the injury as described in Mr. Antone's prison record, introduced into evidence during the penalty phase of the trial. Counsel stated, "I think his health is a matter of record in there and it is a factor to be considered by you in considering the mitigating factor of age."

7. In fact, two of the seven mitigating factors specifically refer to mental qualities.

8. As related by the petitioner, Benjamin Gilford, the confessed triggerman committed suicide while awaiting sentencing. Vic Acosta, the man who communicated the contracts to Antone, died in jail. E. Marlow Haskew, the driver of the car, testified against Antone at trial and plea bargained for a sentence of not more than 35 years.

circumstances found by the trial judge and of the fact that the trial judge found no mitigating factors, "an error in finding this aggravating circumstance does not invalidate the imposition of the death sentence." *Id.* at 1216.

[4] Antone does not present a situation controlled by *Stephens v. Zant*, 631 F.2d 397 (5th Cir.1980), *reh. denied and modified*, 648 F.2d 446 (5th Cir.1981), *certified to the Supreme Court of Georgia*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982). In *Stephens*, the state supreme court ruled that one of the aggravating circumstances presented to the jury was *unconstitutionally vague*. In *Antone*, the Florida Supreme Court intimated that the facts of Antone's case might not be encompassed by the judicial interpretation of the statutory aggravating circumstance. We have recently considered the effect of the Florida Supreme Court's invalidation on non-constitutional grounds of one of several aggravating factors in the absence of mitigating factors. In *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc), we noted that although "the precise impact of the Supreme Court's recent actions in *Stephens* cannot be known at this juncture," "when there are proper state law premises, a death sentence may be sustained by a reviewing court so long as at least one of a plurality of statutory aggravating circumstances is valid and supported by the evidence." *Id.* at 814. We reasoned in *Ford* that because the sentencing judge found no mitigating circumstances and five of the statutory aggravating circumstances found were upheld, "the [Florida Supreme] court logically presumed the weighing process would have reached the same outcome even had the sentencing court not added to the scales those aggravating circumstances found impermissible." This reasoning is equally applicable in Antone's case. We therefore decline to engage in the collateral review of a factor upon which the affirmance of Antone's death sentence was not predicated. As in *Ford*, however, we note that the United States Supreme Court has accepted certiorari of *Barclay v. Florida*, 411 So.2d 1310 (Fla.1982), *cert. granted*, — U.S. —, 103 S.Ct. 340, 74 L.Ed.2d 392 (1982). We therefore remand to the district court to consider the effect that *Barclay* may have on the denial of habeas corpus relief to Antone.

II. THE BROWN ISSUE

Antone formerly joined with 122 other Florida death row inmates in filing an applicable for extraordinary relief and petition for habeas corpus in the Florida Supreme Court. The petitioners challenged the Florida Supreme Court's practice of receiving nonrecord information in connection with the review of capital cases. The Florida Supreme Court dismissed the petition. *Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

[5] Antone again raises the issue of the Florida Supreme Court's practice of receiving nonrecord information in reviewing capital cases. The Eleventh Circuit en banc has recently held that the Florida Supreme Court's statement in *Brown* that nonrecord information did not affect the judgment of the reviewing judges "ends the matter when addressed at the constitutional level." *Ford v. Strickland*, 696 F.2d at 811. Antone's claim is therefore foreclosed by *Ford*.

III. THE EXCULPATORY WITNESS AND STATEMENT

Petitioner contends that the failure of the state to disclose the existence of a witness, Robert Bruns, and his statements violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Petitioner initially presented this issue to the state court in motions for post conviction relief under Florida Rules of Criminal Procedure, Rule 3.850. The state trial judge held a hearing and denied the motions. On appeal to the Florida Supreme Court, the court stated, "the ruling of the trial judge is supported by the evidence, and we find that there was no actual suppression of favorable evidence by the state." *Antone v. State*, 410 So.2d

157, 162 (Fla.1982). The court further noted that while the failure to disclose the name of Bruns may have violated a state rule of criminal discovery, this failure did not prejudice the defendant. *Id.* at 162.

[6] When presented with the *Brady* issue in Antone's petition for habeas corpus, the district court found that petitioner could not overcome the presumption of correctness set forth in 28 U.S.C. Section 2254(d). No argument was advanced that any of the first seven exceptions applied and the district court found that the record fairly supported the state trial judge's decision in accordance with 28 U.S.C. Section 2254(d)(8). On appeal, Antone argues that he was never granted a full and fair hearing in state court, that the conclusions of the state court were not fairly supported by the record and that the state court's conclusions were both legal and factual. Antone received a full and fair hearing in state court and the record fairly supports the state judge's decision. The state courts found that there was no suppression of evidence by the prosecution. This finding concludes the issue under 28 U.S.C. Section 2254(d) and *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner contends he was denied effective assistance of counsel at the voir dire and penalty phase of his trial. Again, the petitioner presented these claims of ineffective assistance of counsel to the state court in motions for post conviction relief under Florida Rules of Criminal Procedure, Rule 3.850. The state trial judge held a hearing and found that petitioner was represented by reasonably competent and effective counsel. The Florida Supreme Court upheld the trial court. *Antone v. State*, 410 So.2d 157, 163 (Fla.1982).

[7] The district court carefully considered petitioner's claims of ineffective assistance of counsel and denied relief. After review of the district court's findings and the record on appeal, we n. ! agree with the district court and reject petitioner's claims of ineffective assistance of counsel.

V. PROSECUTOR'S EXCLUSION OF DEATH SCRUPLED JURORS

[8] On appeal, petitioner does not seriously dispute the district court's conclusion that the jury selection did not violate *Witherspoon v. Illinois*, 391 U.S. 510; 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). However, petitioner does contend that the prosecutor is not permitted to peremptorily challenge a prospective juror on the basis that the juror has voiced some scruples against imposing the death penalty but who cannot be excused for cause under *Witherspoon*. In petitioner's trial, this situation applies to a single juror, Mr. Delgado. As the district court noted, "Mr. Delgado stated during voir dire that he knew the petitioner and had lived only three blocks away from him for a number of years." We agree with the district court that there was certainly a separate and sufficient reason for the state to exercise a peremptory challenge against Mr. Delgado. Thus, the petitioner's legal argument is not supported by the facts of his case and its merits need not be considered.

VI. WARRANTLESS ARREST IN THE HOME

[9] The petitioner was arrested in his home without an arrest warrant prior to his trial in 1976. In 1980, the United States Supreme Court held that the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." *Payton v. New York*, 445 U.S. 573, 576, 100 S.Ct. 1371, 1375, 63 L.Ed.2d 639 (1980). In *United States v. Johnson*, — U.S. —, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), the Supreme Court held that *Payton* is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.[9] The Court did not address the retroactive reach of *Payton* to those cases which may still raise Fourth Amendment

9. *Payton v. New York* was decided on April 15, 1980. The petitioner's conviction and sentence was affirmed by the Florida Supreme Court on

issues on collateral attack, noting "After *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), the only cases raising challenges on collateral attack are those federal habeas cases in which the state has failed to provide a state prisoner with an opportunity for full and fair litigation of his claims." — U.S. ——, ——, n. 20, 102 S.Ct. 2579, 2594, n. 20. The district court correctly found that the state provided the petitioner with a full and fair opportunity to litigate his claim in the state courts and consequently the federal courts are precluded from considering the claim on a petition for writ of habeas corpus under *Stone v. Powell*.

Having considered each of the petitioner's claims and finding each of them to be without merit, the denial of habeas corpus relief under 28 U.S.C. Section 2254 is AFFIRMED and REMANDED.

KRAVITCH, Circuit Judge, concurring specially:

In my view the majority opinion fails to explore adequately the relevant facts of the case and to provide sufficient, reasoned analysis of the claims presented. Because of this concern I write separately on several issues to record my reasons for concurring in the judgment, but not the opinion of the majority.

JURY INSTRUCTIONS ON MITIGATING FACTORS

(MAJORITY'S ISSUE IA)

Cause and Prejudice

As indicated in the majority opinion, Antone's trial counsel failed contemporaneously to object to the instructions on mitigating circumstances. Thus, the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) requires us to determine whether there was cause for the default and actual prejudice resulting therefrom. *Engle v. Isaac*, 456 U.S. 107, 130, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982).[1]

Cause and prejudice is a conjunctive standard, both prongs of which must be satisfied in order for procedural default to be excused and to allow a federal court to review the merits of a claim for habeas relief. *Engle v. Isaac*, 456 U.S. at 134 n. 43, 102 S.Ct. at 1575 n. 43, 71 L.Ed.2d at 804 n. 43. I agree with the majority that given Antone's counsel's "extraordinary vision" in foreseeing *Lockett*, indicated by his effort to dismiss the indictment on these grounds, there was no "cause" to have failed to object to the instruction on mitigating circumstances at the appropriate time. *Cf. Ford v. Strickland*, 696 F.2d 804 at 858 (such "extraordinary vision" should not be expected of counsel as a matter of course in cases preceding the decision in *Lockett*). The majority applies "cause and prejudice," finds no cause, yet proceeds unnecessarily to address the question of prejudice. *See Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. at 1575 n. 43.

Moreover, in doing so, I believe it applied the incorrect standard. *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736–37, 52 L.Ed.2d 203 (1977), relied upon by the majority to conclude there was no

March 27, 1980, rehearing denied on May 21, 1980. The petitioner did not raise the *Payton* issue on direct appeal.

1. Petitioner-appellant argues that the cause and prejudice standard of *Sykes* should not be applied to procedural default arising in the context of death penalty cases where the price of a procedural default, precluding review, may be a human life. He argues this is especially true where the default arises in relation to an unforeseen development in the law, *e.g., Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). To support this argument, he relies on the language of the Supreme Court in *Engle v. Isaac*, 456 U.S. at 135, 102 S.Ct. at 1575, 71 L.Ed.2d at 805: "The terms 'cause' and 'actual prejudice' are not rigid concepts; they take their meaning from the principles of comity and finality ... In appropriate cases those principles must yield to the imperative of a fundamentally unjust incarceration." Given that the majority fails to discuss this issue, I note only that the court's analysis in *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983), *sub silentio* answers appellant's argument. There the court applied the cause and prejudice standard to preclude review of the merits of a similar *Lockett* claim.

prejudice, is inapplicable to analysis of a *Lockett* violation. *Henderson*, which involved a jury charge on causation in a non-capital case, held that the erroneous charge was of constitutional magnitude only if it "so infected the entire trial" that a due process violation occurred. *Id.*

A *Lockett* violation, however, is a direct violation of the eighth amendment as applied to the states through the fourteenth amendment. *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). In *Lockett* the Supreme Court held that a sentencer *must* not be precluded from considering as a mitigating factor any evidence of the defendant's character or record or the circumstances of the offense. *Lockett v. Ohio*, 438 U.S. at 604–05, 98 S.Ct. at 2964–65. If any relevant mitigating evidence proffered by the defendant is precluded by erroneous instructions, therefore, an eighth amendment violation is presented and provides a basis for habeas relief. Consequently, the majority's "infected the entire trial" *due process* analysis, relying on *Henderson v. Kibbe* is irrelevant, unnecessary, and improper.[2]

Having quoted the *Henderson v. Kibbe* standard, the majority proceeds to apply a different test, one that examines the *merits* of the *Lockett* claim, and concludes that "[t]here was nothing in the jury instructions that precluded the jury from considering [evidence proffered in mitigation]." Maj. Op. at 1536. I disagree with the rationale of determining prejudice by reference to the merits of appellant's claim, *see* note 3 *infra*, and while the majority of this panel cannot be faulted for applying the reasoning of *Ford v. Strickland*, I differ with the majority's analysis of "prejudice" here.[3] Because, for purposes of

2. In acknowledging my objection to use of the *Hendgraon v. Kibbe* standard, the majority states:

> In her concurring opinion, Judge Kravitch objects to the citation of *Henderson v. Kibbe* and would apparently rely solely on *Lockett*. However, Antone has argued this issue in the nature of a two prong attack and we have attempted to review it as such. We are aware of no Supreme Court authority indicating to the contrary.

Maj. Op. at note 5. It is not clear to which "two prongs" the majority refers, the issues of "cause" and "prejudice" or the issues of "prejudice" and the "merits" of the *Lockett* claim. Assuming the former, although I believe reference to *Lockett* must be made in determining how both "cause" and "prejudice" are defined in the context of a *Lockett* claim, the two issues are and should be treated as two separate prongs. *See* text *supra*, at 1537. The fact that the same case affects the analysis of two separate issues, however, makes those two issues no less distinct. If the majority refers to the distinction between analysis of "prejudice" and the merits of a *Lockett* claim, as indicated in note 4 *supra*, I believe these are to be treated separately. One issue goes to whether, assuming the alleged error occurred, it is of sufficient constitutional magnitude to justify our reaching the merits despite procedural default; the other, the merits, involves a determination of whether the error occurred, *i.e.*, was the instruction erroneous. Again, however, the fact that reference to *Lockett* is relevant to both issues does not mean the issues are indistinct. Finally, it is not the mere "citation" to *Henderson v. Kibbe* to which I object but the failure to distinguish between an eighth amendment and a fourteenth amendment claim.

3. Relying on *Ford v. Strickland*, the majority here ruled: "There was nothing in the jury instructions that precluded the jury from considering this fact [disparity of appellant's and codefendant's sentences] . . . [and] the jury would not have been precluded from considering [appellant's brain surgery] by the court's instructions." Majority Opinion at 1538 (footnotes omitted). This is a resolution of the *merits* of appellant's *Lockett* claim, rather than resolution of the prerequisite, procedural issue of whether there was actual prejudice from the alleged constitutional violation. *Compare Ford v. Strickland*, No. 690 F.2d 804, at 812–813, *with id.* at 856–59 (Kravitch, J. dissenting).

In *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) the Supreme Court enunciated the standards and appropriate approach to analysis of prejudice in the cause and prejudice test. The constitutional violation there alleged was that the jury that convicted Frady was erroneously instructed on the element of malice, leading to a conviction of first degree murder rather than manslaughter. Frady had failed contemporaneously to object to the instructions as given and, thus, only if the cause and prejudice standard of *Sykes* were met could the federal habeas court reach the merits of his claim. In determining that Frady failed to establish actual prejudice from his failure to object, the Court did not delve into an analysis of whether or not the

analyzing cause and prejudice only, I believe we must assume the violation occurred, see note 3 *supra*, the only relevant inquiry in analyzing "prejudice" under the cause and prejudice standard when the allegation is a *Lockett* violation, is whether any nonstatutory, allegedly mitigating evidence was proffered at trial and, if so, whether that evidence was of a type, consideration of which the Supreme Court held in *Lockett* must not be precluded, *i.e.* was the evidence relevant to defendant's character, his record or the circumstances of the offense. *Lockett v. Ohio*, 438 U.S. at 605, 98 S.Ct. at 2965.

In the instant case, apparently the only nonstatutory mitigating evidence proffered by appellant was the discussion of the disparity of his potential death sentence and his co-defendant's thirty-five year penalty.[4] Whether or not consideration of the evidence of disparity of sentences would have affected the deliberations of the advisory jury or trial judge, is not for federal appellate judges, reviewing a habeas petition, to speculate. *See Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982) ("On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. *We do not weigh the evidence for them*") (emphasis supplied). *Cf. Presnell v. Georgia*, 439 U.S. 14, 16–17, 99 S.Ct. 235, 236–37, 58 L.Ed.2d 207 (1978); *Cole v. Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) (as discussed in *Ford v. Strickland*, 696 F.2d 804 at 869–70). Thus, I would find that the actual prejudice prong of the cause and prejudice standard is satisfied.

Because, however, I agree that there is no cause for the default, I concur in the judgment of the majority that we may not consider the merits of Antone's *Lockett* claim.

THE EXCULPATORY WITNESS AND STATEMENT

(*Brady* issue—Majority's Issue III.)

Antone next raises a *Brady* issue. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In relation thereto he argues that the state court's factual findings deserve minimal deference because "he was never granted a full and fair hearing in state court, that the conclusions of the state court were not fairly supported by the record and that the state court's conclusions were both legal and factual." Maj. Op. at 1540. The sum total of the majority's treatment of the *Brady* issue is that "Antone received a full and fair hearing in state court and the record fairly supports the state judge's decision." *Id.*

Although I am in agreement with the majority's disposition, I cannot join its conclusory analysis of this issue. Furthermore, in my judgment the state courts which addressed Antone's *Brady* violation, and the federal district court, misapplied *Brady* and its progeny. Antone has raised a valid legal argument. Applying the wrong legal standard led the state court to rely upon the wrong facts. Hence Antone's *Brady* claim requires reexamining the law. All the fair and full hearings in the world could not correct the core legal flaw.

In denying Antone's *Brady* claim, the state courts and the federal habeas court

jury instruction was erroneous but proceeded on the assumption that the instruction was in error. No prejudice was found because there was strong evidence of malice in the record. Frady never contended that he acted without malice, and the findings that were required to convict under the instruction that was given were incompatible with a finding of the lesser charge of manslaughter. The Court therefore found that the federal habeas court was precluded from reaching the merits of Frady's claim that the instruction given was erroneous as to malice. *Id.* at 174–75, 102 S.Ct. at 1597–98, 71 L.Ed.2d at 834.

" I am troubled by the developing pattern of addressing the merits of habeas claims while purporting to resolve and considering arguments and authority only relevant to the "prejudice" issue. I am concerned that in future cases litigants and the court will apply these discussions as precedent for resolution of the merits of *Lockett* claims raised on habeas.

4. Although appellant alleges the instructions given precluded consideration of his prior brain surgery, no evidence relevant to this issue was proffered.

relied on the factual finding that the state prosecutors "did not have knowledge of Gilford's statement to Bruns regarding Antone's ignorance of Cloud's murder until after it occurred and his after-the-fact participation in paying the money." *Antone v. State*, 410 So.2d at 162. *See also* Maj. Op. at 1539. No one denies that, regardless of whether the state had knowledge of the substance of Bruns' potential testimony, the state did have Bruns' name in its files, *Antone v. State*, 410 So.2d at 162, as Bruns was the one who gave police their first lead as to who perpetrated the murder. Indeed, the state courts ruled that failure to disclose Bruns' name violated Fla.R.Crim.P. 3.220 which requires the prosecutor "to disclose to defense counsel the names and addresses of all persons known to the prosecutor to have 'information which may be relevant to the offense charged, and to any defense with respect thereto.'" *Antone v. State*, 410 So.2d at 162, quoting Rule 3.220. Under my reading of *Brady* and its progeny, *see United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967), the state's knowledge or assessment of the exculpatory or nonexculpatory nature of the evidence is irrelevant to the analysis of the type of case before us.[5] Only the state's knowledge of the *existence of material* information, exculpatory or not, is relevant. *United States v. Agurs*, 427 U.S. at 103, 96 S.Ct. at 2397, 2398–99. The materiality of the evidence is to be judged by varying standards depending on the factual posture of the case.

In *United States v. Agurs*, the Court set forth the three different situations to which the *Brady* rule could apply. *Id.* at 2397. The first is where a prosecutor uses testimony which he knows or should have known was perjured. In such a case a strict standard of materiality is applied. If there is any reasonable likelihood that t false testimony could have affected t judgment, a new trial is required. *Id.* I one contends that the facts of the insta case fall in this category.

The second possible *Brady* situation where the defendant makes a pretrial r quest for specific information. *Brady* itse exemplifies this situation: defense couns had requested the extra-judicial statement of the defendant's accomplice. *Id.* at 239 The court in *Agurs* explained: "In *Brad* the request was specific [because] [i]t gav the prosecutor notice of exactly what th defense desired." *Id.* at 2399. Where specific request is made, "if the subjec matter of such a request is material, o *indeed if a substantial basis for claimin materiality exists*, it is reasonable to requir the prosecutor to respond either by furnish ing the information or by submitting th problem to the trial judge." *Id.* (emphas added). In this situation, as in the first, th test of materiality is very strict. "Whe the prosecutor receives a specific and rel vant request, *the failure to make any r sponse is seldom, if ever, excusable.*" I (emphasis added). In *Brady* the informa tion which was not disclosed in response t a specific request was found to be immate rial to the guilt phase of the trial onl because under the state rules of evidence it would have been inadmissible. However, it clearly was material to the capital sentencing phase of the trial because more relaxed rules of evidence there apply.[6] Therefore, a new sentencing proceeding was ordered.

The third type of situation to which *Br dy* applies is where no request for informa tion[7] or only a general request for all e culpatory matter, as opposed to a reque for specific material, has been made. *Uni ed States v. Agurs*, 96 S.Ct. at 2399. Her only if the undisclosed information is excu patory and is sufficiently material to hav

5. The prosecutor's knowledge of the exculpatory nature of the evidence is relevant in only one situation identified *infra* at note 7.

6. Under the standards of *Lockett v. Ohio*, applicable today, the information surely was material to Brady's sentence.

7. It is only in this situation where the prosecutor's knowledge of the exculpatory nature of the material is relevant. *United States v. Agurs*, 96 S.Ct. at 2399 (where information obviously is exculpatory prosecutor must reveal even though no request has been made

affected the result of the trial will a new trial be warranted. *Id.* at 2402.

We must determine into which of the three *Brady* situations the present case falls.

In my opinion Antone's attorney made a specific request for information. In a pretrial demand for discovery, counsel, tracing the language of Fla.R.Crim.P. 3.220, requested: "The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto." All that was required of the prosecutor to comply with the request was to examine his files on the Antone case and compile a list of the names and addresses of all persons related to the investigation. While the request may have been broad, depending on the number of names in the file, as in *Brady* "the request was specific. It gave the prosecutor notice of exactly what the defense desired." *United States v. Agurs*, 96 S.Ct. at 2399. The significant distinction between a general and a specific request for *Brady* purposes is that a specific request does not require the prosecutor to make a value judgment as to the exculpatory nature or degree of materiality of the requested information. In contrast, where there is no request or "merely a general request for exculpatory matter," *id.*, the prosecutor must assess whether any particular material is exculpatory. To an extent this requires the prosecutor to analyze the evidence from the defendant's perspective, a role contradictory to the prosecutor's adversarial role. *See Brady v. Maryland*, 83 S.Ct. at 1197, discussing purpose of principle of *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). Accordingly, only when, evaluated in retrospect,[8] the evidence is adjudged to have been exculpatory and material to the degree that it is likely to have affected the result will a new trial be ordered.

Here the request for names a... addresses required no assessment on the part of the prosecutor as to the exculpatory value of the information. It only required disclosure of the names, including Bruns', in the prosecutor's file. Accordingly it was a specific request for information under the standards enunciated in *United States v. Agurs*, 96 S.Ct. at 2398–99.[9]

The state court found that even if there was a specific request for the identity of Bruns, "there is no reasonable likelihood that [anything to which Bruns could have testified] could have affected the outcome of the trial or sentence." *Antone v. State*, 410 So.2d at 160, quoting with approval state trial judge's findings.

As noted above, the Court in *Agurs* stated that "seldom, if ever" will the failure of the prosecutor to respond to a specific request for information be excused. Thus we must determine whether this is one of the rare cases where the failure is excusable. Although this is a close case, I conclude that it is one of the rare cases.

Appellant makes no serious argument that anything to which Bruns could have testified would have had a material impact on the determination of guilt. Rather he contends that Bruns' testimony would have been mitigating in the penalty phase because it would have refuted the evidence that he was the "mastermind" of Cloud's killing. The state court explicitly relied on the fact that he was the "mastermind" in imposing the death penalty. *Antone v. State*, 410 So.2d at 161; *Antone v. State*, 382 So.2d at 316.

During the guilt phase of the trial Antone testified that he had no involvement with the killing. Obviously the jury found this testimony incredible. At the sentencing proceeding, Antone's counsel argued that the state's evidence presented at the guilt phase established that Antone was no more culpable than his co-defendants, and

8. The exculpatory nature and materiality of the evidence must be judged in retrospect because the issue is not the prosecutor's culpability but the fairness of the trial. *United States v. Agurs*, 96 S.Ct. at 2400–01.

9. I would hold therefore that the state court finding to the contrary, *Antone v. State*, 410 So.2d at 160, is an error of law.

"didn't pull the trigger [and] [ ] didn't originate the idea either." Trial Transcript at 1908. Appellant presented no evidence, testimony or arguments that he did not know of the killing until after-the-fact. This was never the theory on which he proceeded. Bruns' testimony that appellant was involved only after-the-fact, if used, would have contradicted the other theories on which appellant had relied. Given this conflict the evidence would not have been mitigating and could not have affected the outcome of the sentence.

I also conclude that there is no likelihood that the penalty would have differed if Bruns had testified that appellant was not the "mastermind" but a mere "go-between" in the overall scheme. As found by the state supreme court and supported by the record, "Bruns' testimony that Antone was the middleman was not new evidence; that fact had been established during the course of the original trial testimony. Antone was a middleman who organized, set up, and masterminded the actual killing." *Antone v. State*, 410 So.2d at 161. That another individual was the one who "originated the idea" that Cloud should be killed does not change the fact that Antone planned how the killing should be accomplished. This aspect of Bruns' potential testimony was merely cumulative of other testimony previously presented by the state and there is no likelihood that it "might have affected the outcome of the [sentence]." *United States v. Agurs*, 427 U.S. at 104, 96 S.Ct. at 2398.

Therefore, for reasons different from those of the majority, I concur in the denial of habeas relief on the *Brady* issue.

I note further, however, that I perceive a fundamental misapplication of the dictates of 28 U.S.C. § 2254(d) and *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

The majority states "the district court found that petitioner could not overcome the presumption of correctness set forth in 28 U.S.C. Section 2254(d)" and that, because the state court found there was no suppression of evidence by the prosecution, "[t]his finding *concludes* the issue under 28 U.S.C. § 2254(d) and *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)." (emphasis added).

Section 2254(d) and the "presumption of correctness," *Sumner v. Mata*, 449 U.S. at 549, 101 S.Ct. at 770, set the standard of proof by which a habeas petitioner must establish the facts of the case. Where, as here, the state has made a factual determination which is refuted by the petitioner, the habeas petitioner must overcome the presumption of correctness afforded the state's factual finding and must establish the contrary fact by convincing evidence, 28 U.S.C. § 2254(d), unless one or more of the eight conditions set forth in 28 U.S.C. § 2254(d)(1)-(8) applies.[10] If one of the

10. Section 2254(d) reads as follows:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for herein-

eight conditions applies, the ...ioner still has the burden of proving his version of the facts by a preponderance of the evidence. *Sumner v. Mata*, 449 U.S. at 551, 101 S.Ct. at 771. However, nothing in § 2254(d) as properly applied "concludes" review of legal or factual issues presented for federal habeas review. Section 2254(d) simply establishes the varying degrees of deference state factual findings are to be afforded and, thus, establishes a habeas petitioner's burden of proof as to factual issues. Even where the presumption applies the contrary fact may be proved by the habeas petitioner; it simply must be proved by convincing evidence. *See Goode v. Wainwright*, 704 F.2d 593, at 605 & n. 14 (11th Cir.1983).

In my opinion, the majority erred (1) in not giving reasons why the hearing was full and fair and why the record supports the finding at issue; (2) in not evaluating whether petitioner established by convincing evidence that the government did suppress evidence favorable to the government. Because, however, under correct *Brady* analysis the factual finding made by the state court on which the district court and the majority rely is not relevant, I do not address these issues.

INEFFECTIVE ASSISTANCE OF COUNSEL

(Majority's Issue IV).

Relying on its view that the "district court carefully considered petitioner's claims of ineffective assistance," Maj. Op. at 1540, the majority summarily affirmed denial of habeas relief, giving no reasons for denial of appellant's nonfrivolous claims. Although the district court no doubt gave careful consideration to the issue, the analysis at least as to one major aspect of the claim is flawed, and the legal standard applied was never identified; hence more thorough consideration is warranted.

Appellant claims that the state evidentiary hearing was not full and fair and therefore an evidentiary hearing was required on this issue in the federal district court. Normally, if the state has not held an evidentiary hearing or if the facts necessary to resolution of the issue raised on habeas were not adequately developed in the state proceedings, a federal habeas court has a duty to conduct an evidentiary hearing. *Burden v. State*, 584 F.2d 100, 102 (5th Cir.1978); *Scott v. Estelle*, 567 F.2d 632 (5th Cir.1978). *See also Guice v. Fortenberry*, 661 F.2d 496, 500 (5th Cir.1981) (en banc); *Jordan v. Estelle*, 594 F.2d 144, 146, (5th Cir.1979). *Cf. Thomas v. Zant*, 697 F.2d 977 (11th Cir. 1983) (where state has held evidentiary hearing but material facts are not adequately developed, absent deliberate bypass by the petitioner, federal habeas court must hold an evidentiary hearing). An exception to this general rule is found, however, where the facts alleged by the petitioner, even if proved, would not entitle him to relief. *Guice v. Fortenberry*, 661 F.2d at 503; *Easter v. Estelle*, 609 F.2d 756 (5th Cir.1980); *Cronnon v. Alabama*, 587 F.2d 246 (5th Cir.), *cert. denied*, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 792 (1978). Another exception exists where "the record before the district court was sufficient for a proper examination of [petitioner's] claims." *Winfrey v. Maggio*, 664 F.2d 550, 552 (5th Cir. 1981). *See also Schultz v. Wainwright*, 701 F.2d 900 at 901 (11th Cir.1982) (evidentiary hearing not required where the district court can determine merits of claim based on existing record).

after, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal Court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

Here, most of the factual issues appellant raises in his claim of ineffective assistance can be resolved by reference to the existing record; presentation of the evidence appellant seeks to proffer would not alter those resolutions. As to those factual disputes that cannot be resolved by reference to the existing record, even if we assume them proved, appellant would not prevail on the ineffective assistance issue.

Thus, even assuming the state hearing was not full and fair, because the following analysis of the merits would not be altered even if appellant were afforded an evidentiary hearing in federal court, no such hearing was required.

Appellant presents three elements to his claim.[11] First, he asserts that counsel was ineffective by virtue of the failure to move for a change of venue in light of prejudicial pretrial publicity. Even if we assume, however, that this did constitute ineffectiveness, it is clear that no prejudice resulted from this failure. *Washington v. Strickland*, 693 F.2d 1243 at 1258 (5th Cir. Unit B 1982) (en banc). A review of the actual voir dire proceedings shows that the venire persons and ultimate jurors adequately were voir dired, even if not by defense counsel, about the effect of pretrial publicity and revealed no basis for a finding that they were prejudiced by such publicity.

In *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), the Supreme Court enunciated the test for whether individual jurors are sufficiently impartial to sit in judgment on the defendant.

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.... It is not required, however, that the jurors be totally ignorant of the facts and issues involved.... To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of the prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 722–23, 81 S.Ct. at 1642–43 (citations omitted). The record of the voir dire shows that each and every juror who indicated that s/he had read or heard about the circumstances of Antone's arrest and indictment were questioned by the prosecutor and/or the defense counsel concerning their ability to render an impartial verdict. These venirepersons each indicated an ability to be impartial and the absence of any preconceived opinion as to guilt. Against this background, responses to additional questions by defense counsel may have been enlightening but the failure to propound such questions does not indicate ineffective assistance.

Appellant next complains that counsel failed to object when prospective jurors were excused for cause because of their convictions about the death penalty, allegedly in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

My review of the record indicates that each dismissal fully was justified under the standards of *Witherspoon v. Illinois*; therefore no objections to the dismissals of the jurors in question could have been successful.

Persons conscientiously opposed to the death penalty may be excused for cause only where their opposition is such that "(1) [ ] they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." *Id.* at 522 n. 21, 88 S.Ct. at 1777 n. 21 (emphasis in original). All the jurors excused for cause because of their views on the death penalty indicated "unambiguously," *id.* at 515 n. 9, 88 S.Ct. at

11. Appellant abandoned his claims that appellate counsel was ineffective.

1774 n. 9, that their decision to guilt would be affected by their views on the death penalty. Thus, there was no *Witherspoon* basis for objections to their dismissal and failure to object does not indicate ineffectiveness. *Cf. Goodwin v. Balkcom*, 684 F.2d 794, 816 (11th Cir.1982) (failure to object to erroneous *Witherspoon* dismissals and to propound more questions to venirepersons evidences ineffectiveness).

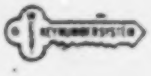
The third aspect of the ineffective assistance claim is trial counsel's failure at the penalty phase to introduce evidence of nonstatutory mitigating factors, request an instruction that nonstatutory mitigating factors could be considered and object to the prosecutor's misleading statements to the jury as to how aggravating and mitigating factors were to be analyzed. Appellant argues that but for this ineffectiveness, mitigating evidence would have been introduced in the form of: (1) the disparity of sentences which would result if appellant were given the death penalty when no co-defendants received the death penalty, (2) the fact that appellant had undergone brain surgery, and (3) testimony of family members and friends as to appellant's character.

Under the standards set forth in *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), the failure of counsel to introduce the above evidence would, in my view, come close to ineffectiveness. However, even if ineffectiveness is assumed, the record shows the absence of any "actual and substantial disadvantage to the course of his defense." *Id.*, at 1262.

The record reveals and the majority points out in its discussion of the *Lockett* claim, that defense counsel argued to the jury that a co-defendant bargained for a thirty-five-year sentence. Under this court's analysis in *Ford v. Strickland*, 696 F.2d 804 at 812, we now assume that arguments to the jury in the penalty phase will be considered by the jury as mitigating evidence even though the jury was never instructed that they could consider the underlying evidence on which those arguments are based. Thus, the evidence as to sentencing disparity was before the jury and appellant cannot claim to be prejudiced by virtue of the failure to introduce more evidence on the same point.

No evidence relative to appellant's brain surgery was proffered, and nowhere in the post-conviction proceedings has appellant alleged specifically what impact this surgery had on his behavior or why this surgery should mitigate his guilt or eligibility for the death penalty. None of appellant's family or friends were called to testify in his behalf but again appellant does not suggest what testimony these persons could have given that would have been mitigating. Thus, even assuming ineffectiveness, appellant has failed to demonstrate how this ineffectiveness disadvantaged him at the penalty phase. Accordingly, the burden of proving "actual and substantial disadvantage," *id.*, cannot be met.

For the foregoing reasons, I concur in the judgment that habeas relief is not warranted on the ineffective assistance claim and, in general, in the judgment but not the opinion of the majority.



UNITED STATES of America,
Plaintiff-Appellee,

v.

Harold HAIMOWITZ,
Defendant-Appellant.

No. 81-6011.

United States Court of Appeals,
Eleventh Circuit.

June 13, 1983.

Defendant was convicted in the United States District Court for the Middle District of Florida, William J. Castagna, J., on one count of conspiracy and eight substantive counts of possession of false and fraudulent

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.
921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.
921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
921.15 Stay of execution of sentence to fine; bond and proceedings.
921.16 When sentences to be concurrent and when consecutive.
921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.
921.18 Sentence for indeterminate period for noncapital felony.
921.185 Sentence; restitution a mitigation in certain crimes.
921.20 Classification summary; Parole and Probation Commission.
921.21 Progress reports to Parole and Probation Commission.
921.22 Determination of exact period of imprisonment by Parole and Probation Commission.
921.231 Presentence investigation reports.
921.241 Felony judgments; fingerprints required in record.

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 285, ch. 19234, 1939; CGL 1940 Supp. 8663(364); s. 131, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 288, ch. 19634, 1939; CGL 1940 Supp. 8663(367); s. 132, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life "[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SEN-

17a

TENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 27, ch. 19704, 1939; CGL 1940 Supp. 8063.26; s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379.

*Note.—Bracketed word inserted by the editors.

Note.—Former s. 919.23.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 28(a), ch. 19654, 1939; CGL 8428, 8437; CGL 1940 Supp. 8063.270; s. 133, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits, shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

History.—s. 261, ch. 19654, 1939; CGL 1940 Supp. 8063.271; s. 134, ch. 70-339.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.—

(1) A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence.

(2) In addition to other credits, a person sentenced to imprisonment in custody of the [1][Department of Offender Rehabilitation] shall receive credit on his sentence for all time spent between sentencing and being placed in custody of the [1][Department of Offender Rehabilitation]. When delivering a prisoner to the [1][Department of Offender Rehabilitation], the sheriff shall certify in writing to the [1][department]:

(a) The date the sentence was imposed and the date the prisoner was delivered to the [1][department].

(b) The dates of any periods after sentence the prisoner was at liberty on bond.

(c) The dates and reasons for any other times the prisoner was at liberty after sentence.

The certificate shall be prima facie evidence of the facts certified.

History.—s. 1, ch. 63-487; ss. 19, 35, ch. 69-106; s. 135, ch. 70-339; s. 1, ch. 70-441; s. 1, ch. 73-71.

[1]Note.—See s. 20.5, ch. 75-49, for powers, duties, and functions of the Division of Corrections transferred to the department.

921.18 Sentence for indeterminate period for noncapital felony.—The court in its discretion may sentence a defendant convicted of a noncapital felony to the custody of the [1][Department of Offender

b. Probation not to exceed three years, the probation to terminate upon respondent's submission of four quarterly status reports in succession.

c. Payment of $187.00 for costs incurred by The Florida Bar in bringing these disciplinary proceedings.

The publication of this opinion shall serve as the public reprimand.

OVERTON, C. J., and BOYD, ENGLAND, SUNDBERG, HATCHETT and KARL, JJ., concur.

Anthony ANTONE, Appellant,

v.

STATE of Florida, Appellee.

No. 50240.

Supreme Court of Florida.

Feb. 16, 1978.

Defendant was convicted in the Circuit Court, Hillsborough County, Herboth S. Ryder, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court held that a hearing was required to determine whether the Department of Criminal Law Enforcement paid substantial fees to the attorneys for a codefendant who negotiated a plea and became the State's principal witness against defendant and, if so, whether the prosecution's failure to reveal that information to the defense was sufficient to warrant a new trial for the defendant.

Remanded.

Adkins, J., dissented.

1. Criminal Law ⇐959

In prosecution for first-degree murder, hearing was required to determine whether Department of Criminal Law Enforcement paid substantial fees to attorneys for codefendant who negotiated plea and became State's principal witness against defendant and, if so, whether prosecution's failure to reveal that information to defense was sufficient to warrant new trial for defendant.

2. Criminal Law ⇐700

For purposes of determining whether State failed to disclose exculpatory evidence to defense, there is no distinction between different prosecutorial offices within executive branch of government.

Angelo M. Ferlita of Diecidue, Ferlita & Prieto, Tampa, for appellant.

Robert L. Shevin, Atty. Gen., Tallahassee, Charles Corces, Jr., Asst. Atty. Gen., Tampa, and T. Edward Austin, Jr., State's Atty., Jacksonville, for appellee.

PER CURIAM.

Anthony Antone was convicted of first degree murder and sentenced to death by the trial judge. He appealed his conviction to us pursuant to Article V, Section 3(b)(1), Florida Constitution, and Section 921.141(4), Florida Statutes (1975).

Subsequent to the filing of this appeal, the prosecuting attorney filed a motion to supplement the record with information which had not previously been revealed either to him or to the defendant. The substance of the information is that the Florida Department of Criminal Law Enforcement apparently paid substantial fees to the attorneys for Ellis Marlowe Haskew, a co-defendant who negotiated a plea and became the State's principal witness against Antone. In light of this new information, Antone has requested that we remand the case to the trial court for a determination as to whether a new trial should be granted.

Antone contends that the State's failure to reveal the information during the course

of pre-trial discovery constitutes a violation of the continuing duty to disclose imposed by Florida Rule of Criminal Procedure 3.220(f), and that the withholding of this information from the defendant resulted in a denial of due process under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny. Antone asserts that the newly-discovered facts explain Haskew's interest in testifying against Antone, that they bear on the issue of Haskew's credibility since they refute Haskew's statements to the jury that he received nothing from the State other than the benefit of his negotiated plea, and that they are so "materially favorable" to Antone's case that a revelation of those facts might have led to a different result at his trial.

[1, 2] In *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968), the Fifth Circuit Court of Appeals said:

> "It is now clear that *Brady* imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence which is materially favorable to the accused either as direct or impeaching evidence."

The record shows that defense counsel assiduously sought all relevant data from the State concerning Haskew's bargain, that this bargain was brought out before the jury in an endeavor to discredit Haskew's testimony, and that Haskew's credibility was a dominant issue, if not the dominant issue for the defense, in Antone's trial. The record also shows that the case against Antone was developed in large part through efforts of the Department of Criminal Law Enforcement, and that officers of that department directly participated in the prosecution. If the alleged fee payments were in fact made to Haskew's attorneys, then even though the prosecuting attorney was not aware of that fact, the Department was. Just as there is no distinction between different prosecutorial offices within the executive branch of the United States government for purposes of a *Brady* violation,[1] there is no distinction between corresponding departments of the executive branch of Florida's government for the same purpose.

It is necessary to ascertain whether the information concerning fees for Haskew's attorneys is accurate, and, if so, whether a *Brady* violation occurred in this case that is sufficient to warrant a new trial for Antone. In considering the latter issue, the trial court should be guided by materiality standards defined by the United States Supreme Court in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

This case is remanded to the trial court for the purpose of determining whether there is a factual basis for the information allegedly withheld by the State, and, if so, whether it is so "materially favorable" to Antone's defense as to require that a new trial be granted. In view of the fact that the alleged *Brady* violation may necessitate a new trial, it would be pointless for us to pass upon the merits of Antone's appeal at this time.

It is so ordered.

OVERTON, C. J., and BOYD, ENGLAND, SUNDBERG, HATCHETT and KARL, JJ., concur.

ADKINS, J., dissents.

1. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

THE FLORIDA BAR, Complainant,

v.

Remus C. E. ALLEN, Respondent.

No. 51555.

Supreme Court of Florida.

Feb. 16, 1978.

Disciplinary proceeding was brought against attorney. The referee made find-

ney's fees, to be determined at a subsequent hearing, was error. In *Cummings v. Cummings*, 330 So.2d 134, 136 (Fla.1976), we cited *Mertz v. Mertz*, 287 So.2d 691 (Fla. 2d DCA 1973), as correctly stating that the purpose of section 61.16, Florida Statutes, was to ensure that both parties will have similar ability to secure competent legal counsel. Without question, the financial positions of the parties in this proceeding are not the same. The husband has a superior financial ability to secure and pay counsel. It is not necessary that one spouse be completely unable to pay attorney's fees in order for the trial court to require the other spouse to pay these fees. Given the complexity of the cause and the time necessary to appropriately resolve the issues, the award of attorney's fees in this case was proper to avoid an inequitable diminution of the fiscal sums granted the wife in these proceedings.

For the reasons expressed, the decision of the district court is quashed, and the final judgment of the trial court is reinstated.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD and ALDERMAN, JJ., concur.

SUNDBERG, J., concurs in result only.

Anthony ANTONE, Appellant,

v.

STATE of Florida, Appellee.

No. 50240.

Supreme Court of Florida.

March 27, 1980.

Rehearing Denied May 21, 1980.

Defendant was convicted before the Circuit Court, Hillsborough County, Herboth S. Ryder, J., of murder in the first degree, the trial judge imposed the death sentence, and defendant appealed. The Supreme Court held that: (1) search of defendant's house was not improper; (2) defendant's statements were admissible; (3) testimony implicating defendant in other crimes was properly allowed; (4) inquiry concerning State's witness' character was properly limited; (5) trial court properly denied motion to compel disclosure of confidential informant; (6) motion to dismiss indictment was properly denied; (7) death penalty statute is not unconstitutional; (8) defendant was not entitled to a new trial on basis of newly discovered evidence; and (9) death sentence was properly imposed.

Affirmed.

1. Searches and Seizures ⇐3.6(1)

Fact that supporting affidavit for search warrant alleged that defendant kept counterfeit currency in his home and no counterfeit money was found as a result of the search did not render search warrant invalid, where there was no showing that statement concerning counterfeit money was intentionally or falsely made and where, even if such statement were excised, remainder of the affidavit was sufficient to establish probable cause.

2. Searches and Seizures ⇐3.6(3)

Aguilar-Spinelli test requires that warrant which is based on informant's tip must establish that information provided by informant, if true, is sufficient to support finding of probable cause, and that affidavit must establish that informant is credible or his information is reliable.

3. Searches and Seizures ⇐3.6(4)

Allegations in affidavit supporting search warrant that projectiles fired from murder weapon would be found in couch or wall in defendant's home and that counterfeit money was kept by defendant in his home established probable cause to support search warrant.

4. Searches and Seizures ⇐3.6(4)

Affidavit which revealed both source of information of informant, who confessed to

his part in murder and who stated that he was present when victim was murdered with .32-automatic pistol, and which alleged that projectiles fired from murder weapon would be found in a couch or wall in defendant's home and that counterfeit money was kept by defendant in his home, and corroborating evidence found by independent investigations, which included test revealing that bullet recovered from victim's body had been fired from a .32-calibre pistol, was legally sufficient for issuance of search warrant for defendant's home.

5. Searches and Seizures ⇐3.8(2)

Shed behind defendant's house was proper subject of search warrant which described place to be searched as including "curtilage," notwithstanding fact that blue fiber which was used to pack silencer of murder weapon, and which was found in shed was not described in the search warrant.

6. Searches and Seizures ⇐3.8(2)

Term "curtilage" encompasses workshed used in connection with a dwelling, for purposes of search pursuant to properly issued warrant.

See publication Words and Phrases for other judicial constructions and definitions.

7. Criminal Law ⇐412(4)

Fact that defendant suffered heart attack on the night of his arrest did not prevent his appreciation of *Miranda* warnings, create coercive atmosphere, or preclude admission of his incriminating statements, which were made before he began to complain of discomfort and following the administration of warnings.

8. Criminal Law ⇐412.1(1)

Voluntary statements are not barred from admissibility by the Fifth Amendment. U.S.C.A.Const. Amend. 5.

9. Criminal Law ⇐412(4)

Defendant's statement on night of his arrest that "Sicilians do not fink," which was made after his admission to hospital following mild heart attack, and after doctor advised police officers it would be all right to speak with defendant, was voluntary and admissible. U.S.C.A.Const. Amend. 5.

10. Constitutional Law ⇐266.1(5)
Criminal Law ⇐414

Ideally, trial judge should specify his conclusions concerning voluntariness of disputed confession or inculpatory statement; however, due process is not offended when issue of voluntariness is specifically before judge and he determines that the statements are admissible without using word "voluntary." U.S.C.A.Const. Amends. 5, 14.

11. Criminal Law ⇐394.6(5)

Where only issue before court at suppression hearing was voluntariness of defendant's statements, and evidence clearly supported finding that such statements were free from coercion, trial judge's naked denial of the motion to suppress was not error.

12. Criminal Law ⇐407(1), 698(1)

Testimony of agent that defendant told him that defendant was "100 percent Sicilian" and "Sicilians do not fink", which testimony was not objected to at trial, was permissible as it recounted defendant's affirmative statement, and did not constitute impermissible comment on defendant's decision to remain silent.

13. Criminal Law ⇐369.2(4)

In prosecution for murder, witness' testimony that defendant wanted witness to kill five men pertained to part of the primary arrangements for contract murder at issue and was therefore relevant to show existence of conspiracy to commit murder.

14. Witnesses ⇐342

Trial court properly limited direct examination which sought to elicit individual and personal view of character witness as to State's witness' reputation for truth and veracity; overruling *Nelson v. State*, 32 Fla. 244, 13 So. 61 (1893) and *Robinson v. State*, 16 Fla. 835 (1878).

15. Witnesses ⇐342

Only general reputation of witness in the community is admissible to impeach witness' reputation for truth and veracity.

16. Criminal Law ⇐1170¾(1)

Where record reflected that witness was properly allowed to tell jury that State's witness' reputation for truth and veracity in the community was not good, State's witness' reputation was properly placed before jury and defendant was therefore not prejudiced by exclusion of question which sought to elicit individual and personal view of the character witness.

17. Criminal Law ⇐627.10(2)

Defendant failed to sustain his burden of showing prejudice by nondisclosure of confidential informant, who was not present at any material point in the crime and did not testify at defendant's trial.

18. Grand Jury ⇐17

More than mere conclusory statements are necessary to sustain defendant's challenge to selection of grand jury which indicted him. West's F.S.A. §§ 905.02-905.06.

19. Grand Jury ⇐1

Protections afforded by Bill of Rights do not attach in full to grand jury proceedings which are inquisitorial rather than adversary in nature.

20. Grand Jury ⇐33, 35

Defendant's rights to confront his accusers and to counsel and other constitutional rights were not violated by grand jury proceedings, which were inquisitorial rather than adversary in nature.

21. Criminal Law ⇐1206(1)
Homicide ⇐8

First-degree murder statute and death penalty statute are not unconstitutional. West's F.S.A. §§ 775.082, 921.141.

22. Criminal Law ⇐942(1)

If prosecution knew or should have known of perjured testimony in its case and there was reasonable likelihood that the false testimony could have altered jury's judgment, fundamental fairness mandates that new trial be granted.

23. Criminal Law ⇐919(1)

Where questions asked of State's witness both in deposition and in trial were directed solely to plea bargain agreement, and State's witness' answers could fairly be characterized as truthful, State's failure to disclose information that Department of Criminal Law Enforcement had paid an attorney to represent State's witness did not mandate new trial.

24. Criminal Law ⇐919(1)

If requested evidence is withheld by the prosecution following specific request by defendant and the evidence is "material," meaning that it might have affected outcome of the trial, new trial must be ordered.

25. Criminal Law ⇐919(1)

Where defense counsel made only general demands for material or information within State's possession or control which tended to negate guilt of defendant and filed motion seeking disclosure of all evidence favorable to the defendant, State's failure to disclose that Department of Criminal Law Enforcement had paid attorney to represent its principal witness did not mandate ordering of new trial, since no specific request for such information was ever made by defense.

26. Criminal Law ⇐940

Where evidence that State Department of Criminal Law Enforcement had paid for attorney representation of its principal witness in no way detracted from testimony presented by State which established defendant's guilt beyond reasonable doubt, such evidence was useful for impeachment of principal witness and was not germane to defendant's guilt or innocence, other evidence tending to impeach principal witness was already before the jury and undisclosed evidence would have added little to defense efforts to show principal witness as unworthy of jury's belief, and there was no showing of conspiracy between principal witness' counsel and State, undisclosed evidence failed to meet standard of "materiality" and therefore new trial was not required.

27. Criminal Law ⇐1208(1)

It is duty of Supreme Court to examine record to determine whether there are clear and convincing facts which warrant imposition of death penalty.

28. Homicide ⇐354

Trial court's finding that defendant had been convicted of two armed robberies which involved threat of violence to a person was appropriately "aggravating circumstance" justifying imposition of death penalty following defendant's conviction for first-degree murder. West's F.S.A. § 921.-141(5)(b).

29. Homicide ⇐354

Trial court's finding that first-degree murder had been committed for pecuniary gain in that defendant received at least $750 for his share of the contract killing was appropriate "aggravating circumstance" so as to warrant imposition of the death penalty. West's F.S.A. § 921.-141(5)(f).

30. Homicide ⇐354

Trial court's finding that contract murder was committed to disrupt and hinder enforcement of laws in that it prevented victim from testifying before grand jury was appropriate "aggravating circumstance" justifying imposition of the death penalty. West's F.S.A. § 921.141(5)(g).

31. Homicide ⇐354

Defendant who was mastermind of contract killing, and who supplied the gun, paid money from his pocket, and pressured accomplice to complete the task, was not a minor participant or mere accomplice in capital felony committed by another person so as to mitigate sentence of death.

32. Homicide ⇐354

Error in finding aggravating circumstance that murder was heinous, atrocious, or cruel does not invalidate imposition of the death sentence supported by other aggravating circumstances.

33. Homicide ⇐354

Where trial court properly found three aggravating circumstances so as to warrant imposition of death penalty upon defendant following conviction for first-degree murder, and no mitigating circumstances were found, Supreme Court did not need to consider appropriateness of trial court's finding that the murder was heinous, atrocious, or cruel in determining propriety of the death sentence.

Angelo M. Perlita of Diecidue, Perlita & Prieto, Tampa, for appellant.

Jim Smith, Atty. Gen., Charles Corces, Jr., Asst. Atty. Gen., Tampa and T. Edward Austin, State's Atty., Jacksonville, for appellee.

PER CURIAM.

The appellant Anthony Antone was convicted of murder in the first degree. The trial judge imposed the death sentence in accordance with the jury's advisory sentence recommendation. We have jurisdiction.[1]

For the reasons expressed, we affirm this contract murder conviction and the imposition of the death sentence.

Our consideration of this cause was delayed by the remand for testimony on an application for new trial relative to an agreement made by the Florida Department of Criminal Law Enforcement (FDCLE) for attorney representation of the principal witness, Haskew, and the payment of $11,500 fee for attorney services. This agreement was unknown to either the prosecutor or defense counsel until this cause was on appeal to this Court. We find the conduct of the FDCLE improper but conclude there was no prejudicial error when we consider the totality of the record.

This murder was committed on the morning of October 23, 1975, when Detective Richard Cloud, a suspended Tampa police officer, was killed at the front door of his home. Antone's conviction was based on the fact that he was the mastermind of this execution slaying, and he directly hired the two men who carried out this contract murder. One of the men Antone hired, Ellis Marlow Haskew, was the primary witness for the state.

1. Art. V, § 3(b)(1), Fla.Const.

Haskew's trial testimony revealed the following material facts of this murder. Upon discharge from Florida State Prison in May, 1975, Haskew returned to Tampa to live and to establish contact with Antone. In September, 1975, Haskew helped Benjamin Gilford to escape from prison, after which he and Gilford went to the Bradenton area to live. Immediately after this escape, Antone advised Haskew by telephone that he was looking for someone to perform five "installations," which Haskew defined as murders. Haskew and Gilford then traveled to Tampa where Antone personally informed Haskew that another man wanted five people killed, including Richard Cloud. Haskew accepted $1,750 in "front money" which was used in part to purchase a used Oldsmobile. In late September, 1975, he went to Antone's house and was given a .32 caliber automatic with an attached silencer to test. Although Antone previously had tested the gun himself, he wanted Haskew to check the effectiveness of the silencer. Haskew fired the gun twice into a rattan couch in Antone's home. After the testing, Antone repacked the silencer with fiber used in air conditioning filters which he stored in a shed behind his house.

In addition to supplying Haskew with the gun, Antone gave him a picture of Cloud and drove Haskew by Cloud's home. Approximately ten days before Cloud's death, Antone asked Haskew to complete his assignment because Cloud was due to testify before a grand jury about matters concerning Antone's friends. Haskew made final preparations for this murder by constructing a cardboard box to conceal the weapon, retesting the gun, which required more packing fiber from Antone, and obtaining ammunition from an outside party. On October 23, 1975, he and Gilford drove past Cloud's home and noticed that only Cloud's car was there. They circled the house, and Gilford left the vehicle. While Gilford entered the house, Haskew drove around the block. When he returned to pick Gilford up, he saw an ashtray fly out of the front door after Gilford. Haskew recalled that Gilford later explained that Cloud had thrown an ashtray or a plant at him as he fired at Cloud. Antone visited Haskew at his apartment later that day, gave him $200 to get Gilford out of town, and drove with Haskew to Gandy Bridge to dispose of the murder weapon in Tampa Bay. Haskew made several trips between Tampa and Miami in the ensuing days and received about $9,000 from Antone in several installments. It was also established that Antone personally received at least $750 for this contract murder.

On February 25, 1976, at approximately 8:30 a. m., Haskew was arrested in Miami. Although he initially denied involvement with the Cloud murder, later that day he admitted his participation and agreed to cooperate with law enforcement authorities. Haskew fully implicated Antone as the person who hired him and Gilford to murder Cloud. He also explained the telephone code arrangement which enabled Antone to determine the number from which Haskew was calling. Upon receiving the code, Antone would return the call to that number from a telephone booth. In cooperation with the FDCLE, Haskew called the appellant at approximately 8:30 p. m. that same day and used the code to have Antone return the call at a pay phone in the FDCLE building in Miami. The appellant Antone had been placed under surveillance at the time and was observed leaving his house and going to a pay phone booth around the corner. A recording made of the return call from Antone was later introduced into evidence.

Approximately an hour and a half later, at 10 p. m. on February 25, 1976, Antone was arrested at his home and taken to the office of the Federal Bureau of Investigation. While at that office, Antone complained of chest pains and discomfort. Antone was taken to the hospital where he was subsequently placed in the coronary care unit. At approximately 1:10 a. m. the following morning, with the approval of the attending physician, FBI agent Arwine entered Antone's hospital room. Arwine testified that "Mr. Antone told me that he was a hundred percent Sicilian and Sicilians do not fink."

In the afternoon of February 26, 1976, a search warrant was issued to search Antone's residence, including any vehicles, curtilages and appurtenances. The warrant sought from the premises "certain evidence, to wit: .32 caliber projectiles, couch, cushions, couch stuffing, and counterfeit currency." The affidavit in support of the warrant stated: (1) Richard Cloud was shot and killed on October 23, 1975, and evidence from the crime scene indicated that the shots fired were from a .32 caliber automatic pistol; (2) Ellis Marlow Haskew had been arrested and had admitted being present at the murder of Cloud by Benjamin Gilford, and that Gilford used a .32 automatic pistol given to Haskew by Antone; (3) prior to giving the pistol to Haskew, Antone tested the weapon by firing it into a couch in the den of his residence, and the fired projectiles were still in the couch, floor, or surrounding walls; (4) at the time of Antone's arrest, the arresting officer had seen a couch in those premises; and (5) Haskew had informed the affiant that Antone kept counterfeit money in the premises, and this appeared to be confirmed in a recorded conversation between Haskew and Antone which was overheard by the affiant.

On February 26, 1976, a search of Antone's premises was conducted in accordance with the warrant at approximately 6:30 p. m. A bullet was recovered from a rattan couch which, when compared with the bullet removed from the left leg of Cloud, was found to have been fired from the same weapon. Identical comparisons were also made with other bullets found at Cloud's home, including spent bullets found on the carpet under the dining room table, beneath the couch, and under the house in a joist. In addition, the search produced blue air conditioning fibers which were seized from a work shed in the rear of Antone's house. Haskew had stated that these fibers were used to pack the silencer. Expert testimony indicated that these seized fibers compared favorably with fibers taken from the screen door at Cloud's house immediately following the murder.

In support of Haskew's testimony, a neighbor testified that he was standing in his carport and heard shots from the direction of Cloud's house. He looked up and saw a car with a driver in it. The engine was running and the passenger door was wide open. A few seconds later a man ran from Cloud's house with a brown cardboard box in his hand, jumped in the car, and sped off. The record further reflects that cardboard fragments were found near the screen door of Cloud's house, and four bullet holes were in the door. Cloud's mother testified that a week prior to her son's death a man whom she identified as the appellant Antone came to Cloud's home asking for him.

Antone testified in his own behalf and denied participation in this murder-for-hire scheme. Counsel for the appellant also presented testimony impeaching Haskew's reputation for truth and veracity. Haskew acknowledged during cross-examination that, with the advice of counsel, he had entered into a plea agreement with the state. Under the agreement Haskew would receive a thirty-five year sentence, and he expected to be eligible for parole in seven to eight years.

The jury returned a verdict of guilty and recommended the imposition of the death penalty. The trial judge imposed the death sentence, finding as aggravating circumstances: (1) Antone had been convicted of two armed robberies which were felonies involving the use of threat of violence to another person; (2) this was a contract murder and therefore committed for pecuniary gain; (3)Antone ordered the execution of Cloud to disrupt and hinder the enforcement of laws; and (4) the murder was particularly heinous, cruel, and vicious. The trial judge found no mitigating circumstances.

While this cause was on appeal, the prosecuting attorney filed a motion to supplement the record which advised this Court that the FDCLE had paid substantial fees to attorneys for Ellis Marlow Haskew and that such information had not been previously known to the prosecuting attorney. In *Antone v. State*, 355 So.2d 777 (Fla.1978),

we remanded this cause to the trial court for a determination of whether a violation prohibited by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), had occurred and whether a new trial should be granted. We advised the trial court that it should be guided by the materiality standards defined by the United States Supreme Court in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

In a detailed order, the trial court denied a new trial. It found that the FDCLE had paid the sum of $11,500 for an attorney to represent Haskew, and that Haskew was aware of this fact. The trial court further found that the questions asked of Haskew, both in deposition and at trial, were directed solely to the plea bargain and were answered truthfully. The trial court concluded that there was no violation of the standards established by the United States Supreme Court in *Brady v. Maryland* and *United States v. Agurs*.

We will consider the issues raised in this appeal in three parts: (a) the trial phase, (b) the request for new trial on the grounds of newly discovered evidence, and (c) the appropriateness of the sentence.

A. *Trial Phase*

Antone contends his conviction should be set aside because: (1) the search of his house was improper; (2) his statements were inadmissible; (3) testimony relating to his silence was improperly admitted in evidence; (4) testimony implicating him in other crimes was improperly allowed; (5) inquiry concerning Haskew's character was improperly limited; (6) the trial court improperly denied his motion to compel disclosure of a confidential informant; (7) his motion to dismiss the indictment was improperly denied; and (8) Florida's death penalty statute is unconstitutional. For the reasons expressed, we reject each contention.

Validity of Search Warrant

[1] In challenging the validity of the search warrant, Antone asserts that the supporting affidavit contained material misrepresentations, contained an insufficient statement of underlying facts, and lacked the requisite specificity in describing the scope of the search. The asserted misrepresentation is based on the statement that "Anthony Antone keeps counterfeit currency within the northeast bedroom door frame." Because no counterfeit money was found, Antone contends this statement was false and, therefore, the evidence obtained under the authority of the warrant must be suppressed. Although the state disputes the falsity of the allegations, we need not decide the issue of its truth or falsity. The issue is controlled by *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), which held that where a defendant makes a preliminary showing that a false statement made knowingly and intentionally or with reckless disregard for the truth was included by the affiant in the search warrant affidavit and the false statement was necessary to the finding of probable cause, and evidentiary hearing must be held. If during an evidentiary hearing the alleged perjury is established by preponderance of the evidence, the court must then excise the falsity from the affidavit and review the remainder of the affidavit to determine whether there remains sufficient grounds to establish probable cause. There was an evidentiary hearing in the instant case. There was no showing that the statement was intentionally and falsely made. In fact, during the suppression hearing counsel stated: "We don't suggest that the misrepresentation was intentional." Further, and most important, we find that even if the challenged statements were excised, the remainder of the affidavit is sufficient to establish probable cause.

[2-4] The appellant also attacks the search warrant on the basis that there are insufficient underlying facts to meet the tests set forth in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). The *Aguilar-Spinelli* test requires that a warrant which is based on an informant's tip must: (1) establish that the information provided by the informant, if true, is sufficient to support a finding of probable cause,

and (2) the affidavit must establish that the informant is credible or his information is reliable. The allegations in the affidavit that projectiles fired from the murder weapon would be found in a couch or in a wall in Antone's home and that counterfeit money was kept by Antone in his home clearly establishes probable cause. Secondly, the credibility of Haskew's confession, that he was present when Richard Cloud was murdered with a .32 automatic pistol, was established when tests revealed that a bullet recovered from Cloud's body had in fact been fired from a .32 caliber pistol. Further, the affidavit's detailed description of Antone's home was in part corroborated by a police officer who recently had been at the home and had seen a couch located in precisely the place where Haskew described. The affidavit reveals both the source of Haskew's information and the corroborating evidence found by independent investigations. In our view, this affidavit meets both federal and state requirements and is legally sufficient.[1]

[5, 6] The appellant next contends that the admission into evidence of the blue fiber was improper because it was seized from the shed or workshop behind Antone's house and the description of the fiber was not included in the warrant. We disagree. The description of the place to be searched expressly included the term "curtilage." That term encompasses a workshed used in connection with a dwelling for the purposes of a search pursuant to a properly issued warrant. *See Joyner v. State*, 303 So.2d 60 (Fla. 1st DCA 1974); *Phillips v. State*, 177 So.2d 243 (Fla. 1st DCA 1965). We find that the shed was a proper subject of the search warrant, and, under the circumstances of this case, the seizure of the fiber was proper and reasonable.

1. Florida courts have also been called upon to apply the *Aguilar-Spinelli* test. *See, e. g., Findlay v. State*, 316 So.2d 33 (Fla.1975); *State v. Smith*, 233 So.2d 396 (Fla.1970); *St. John v. State*, 356 So.2d 32 (Fla. 1st DCA 1978); *Davis v. State*, 350 So.2d 534 (Fla.2d DCA 1977), *cert. denied*, 355 So.2d 517 (Fla.1978).

Admissibility of Appellant's Statements

[7] Antone contends that several brief statements which he made following his arrest should have been suppressed because they were obtained in violation of his fifth amendment privilege against self-incrimination. On the night of his arrest, Antone suffered a mild heart attack which he claims prevented his appreciation of the *Miranda* warnings, created a coercive atmosphere, and precluded his statements from being genuinely voluntary. We reject these contentions and find that Antone's actions reflect a complete understanding of his situation. Immediately following the administration of the warnings and prior to his mild heart attack, he agreed to be interviewed and further agreed to speak with Haskew over the phone, at which time he continually repeated "Marlow, why did you do this to me?" Antone began to complain of discomfort only after the telephone conversation and an admission that he knew Haskew and two other men were the subject of an investigation.

[8, 9] Antone also challenges the admissibility of his statement made at the hospital, "Sicilians do not fink." This statement, however, appears from the record to be clearly voluntary and was made after a doctor advised officers it would be all right to speak with Antone. Voluntary statements are simply not barred from admissibility by the fifth amendment.

[10, 11] Antone next asserts that the trial judge's naked denial of the motion to suppress these statements mandates a reversal pursuant to *McDole v. State*, 283 So.2d 553 (Fla.1973). This Court, however, has modified the strict requirement that an express finding must appear in the record. *See Wilson v. State*, 304 So.2d 119 (Fla. 1974); *Henry v. State*, 328 So.2d 430, 431 n.1, (Fla.), *cert. denied*, 429 U.S. 961, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976).[2] Ideally,

2. *Wilson* and *Henry* are distinguishable from our decision in *Greene v. State*, 351 So.2d 941 (Fla.1977). In *Greene* we did not address the applicability of *McDole*, but, instead, we discussed the issue of remand when voluntariness is not clear.

the trial judge should specify his conclusions concerning the voluntariness of a disputed confession or inculpatory statement. However, due process is not offended when the issue of voluntariness is specifically before the judge and he determines that the statements are admissible without using the magic word "voluntary." The record reflects that the only issue before the court was the voluntariness of Antone's statements. The evidence clearly supports the finding that these statements were free from coercion. The resulting denial of the motion to suppress was thus not in error.

Comment on Silence

[12] Antone contends that the following testimony of Agent Arwine constitutes impermissible comment on Antone's decision to remain silent:

> I thereafter went into the room and was, during this period, from 1:10 until 1:20, the time I left the room, there was a nurse in and out of the room and Mr. Antone did not volunteer any information except he made one statement. Mr. Antone told me that he was a hundred percent Sicilian and Sicilians do not fink.

We find this testimony permissible as it recounted Antone's affirmative statement. In fact, Antone did not stand mute; Arwine's testimony comments not on Antone's silence but on what he said. Further, defense counsel interposed no objection at trial and, therefore, there is no fundamental constitutional error. *Clark v. State*, 363 So.2d 331 (Fla.1978).

Evidence of Unrelated Criminal Activity

[13] Antone maintains that we must reverse because the trial court failed to grant a mistrial following Haskew's testimony implicating Antone in other criminal activity. Haskew's testimony related that Antone wanted him to kill five men, three named and two unnamed. Our view of the record establishes that the challenged testimony relating to other criminal activity occurred as part of the primary arrangements for this contract murder and was therefore relevant to show the existence of this conspiracy. *See Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

Improper Limitation in Presenting Impeachment Testimony

[14, 15] Antone asserts that the trial court erroneously limited the direct examination by defense counsel of a character witness whose testimony impeached Haskew's reputation for truth and veracity. Mr. Tommy Walker, former mayor of the City of Bartow, testified:

> Q Mr. Walker, do you know the general reputation of Ellis Marlow Haskew for truth and veracity in the community of Bartow?
>
> A I would think I do, yes.
>
> Q Have you ever discussed his reputation with others in the community?
>
> MR. BOWDEN: Your Honor, I object to the form of the question.
>
> THE COURT: You may rephrase that.
>
> Q (By Mr. Ferlita) Have you ever heard his reputation discussed by other people?
>
> A Yes, sir, often.
>
> Q What is that reputation of Ellis Marlow Haskew for truth and veracity within the community of Bartow?
>
> MR. BOWDEN: Objection to the form of the question, Your Honor.
>
> THE COURT: Overruled.
>
> THE WITNESS: Answer?
>
> THE COURT: Yes, you may answer.
>
> THE WITNESS: I would say it's not good.
>
> Q (By Mr. Ferlita) Based on the general reputation of Marlow Haskew for truth and veracity, would you believe him under oath?
>
> MR. BOWDEN: Objection, Your Honor. That is an improper question of the witness.
>
> THE COURT: Sustained.

This record clearly reflects that the witness was properly allowed to tell the jury that Haskew's reputation for truth and ve-

racity in the comm unity was not good. A further question o' d to by the prosecution and sustained by the trial court sought to elicit the individual and personal view of the witness. We agree with the trial court. The clear weight of authority allows only the general reputation of the witness in the community to be admissible.[4] *See generally* C. McCormick, Evidence § 44 (2d ed. 1972).

[16] Antone cites two early cases which in dicta suggest that the excluded question would be permissible. *Nelson v. State*, 32 Fla. 244, 13 So. 61 (1893); *Robinson v. State*, 16 Fla. 835 (1878). To the extent that these cases allow this type of opinion evidence to impeach a witness, we overrule them. We also find Antone was not prejudiced by the exclusion of the disputed question. Haskew's reputation was properly placed before the jury by the previous question and answer.

Failure to Disclose Confidential Informant

[17] Antone asserts that we must reverse because the trial court denied his motion to compel disclosure of a confidential informant. The case relied on by Antone, *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), does not mandate disclosure of every confidential informant. Rather, a careful balancing of interests is necessary. The record reflects that this confidential informant was not present at any material point in this incident and did not testify. We find Antone has not sustained his burden of showing prejudice by this nondisclosure. *See Hawkins v. State*, 312 So.2d 229 (Fla. 1st DCA 1975).

Failure to Dismiss Indictment and Constitutionality of the Death Penalty Statute

[18-20] Antone contends that the grand jury which indicted him was improperly selected. More than mere conclusory statements, however, are necessary to sustain such a challenge. *See* §§ 905.02-.06, Fla. Stat. (1977). He also contends that the right to confront his accusers, the right to counsel, and other constitutional rights were violated by the instant grand jury proceedings. The protections afforded by the Bill of Rights, however, do not attach in full to grant jury proceedings which are inquisitorial rather than adversary in nature. *See, e. g., United States v. Mandujano*, 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976); *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); *United States v. Mara*, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973); *In re Groban*, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376 (1957).

[21] Antone finally urges, without elaboration, that the first-degree murder statute and the death penalty statute are unconstitutional. These issues have been previously rejected, and the law is now settled. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976); *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied, Hunter v. Florida*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

B. *New Trial Upon Newly Discovered Evidence*

Antone contends that he is entitled to a new trial because of the discovery subsequent to trial that the FDCLE had paid an attorney $11,500 to represent Haskew. Antone argues that the failure to disclose this information prior to trial violates both Florida Rule of Criminal Procedure 3.220 and the dictates of *Brady v. Maryland* and *United States v. Agurs*. We remanded this cause to the trial court, *Antone v. State*, 355 So.2d 777 (Fla.1978), for an evidentiary hearing to determine if a new trial should be granted. The trial court denied a new trial, and we agree.

[22, 23] The resolution of this issue is controlled by the guidelines established in

4. Our holding in this matter is consistent with the new Florida Evidence Code, effective July 1, 1979. § 90.609, Fla.Stat. (Supp.1978).

Agurs. There the majority opinion outlined three situations in which a *Brady* violation might occur. The first situation occurs when undisclosed evidence demonstrates that the prosecution's case included perjured testimony. If the prosecution knew or should have known of the perjury and there is a reasonable likelihood that the false testimony could have altered the jury's judgment, then fundamental fairness mandates that a new trial be granted. Antone contends that Haskew's testimony concerning the plea bargain arrangement was false, that the prosecution should have known it was false, and that it could have affected the judgment of the jury. We cannot agree. As the trial court reasoned in its detailed order, questions asked of Haskew both in deposition and at trial were directed solely to the plea bargain agreement. Taken in context, Haskew's answers can fairly be characterized as truthful.

[24, 25] The second situation occurs when a pretrial request for specific evidence is made. If the requested evidence is withheld by the prosecution following a specific request and the evidence is material—meaning that it might have affected the outcome of the trial—then a new trial must be ordered. The *Agurs* court succinctly stated: "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 U.S. at 106, 96 S.Ct. at 2398. In the instant case defense counsel made only general demands for "material or information within the State's possession or control which tends to negate the guilt of the Defendant . . ." Antone's attorneys also filed a motion seeking disclosure of all evidence favorable to the defendant. We therefore find this second situation not applicable because no specific request was ever made.

[26] The third situation occurs when a general request for *Brady* information has been made and a failure to disclose has followed. In this situation, the standard of "materiality" which *Agurs* states must be applied is as follows:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

427 U.S. at 112-13, 96 S.Ct. at 2402 [footnotes omitted]. Applying this test to the undisclosed evidence of FDCLE's payment of Haskew's attorney's fees, we find that Antone's conviction must stand. The evidence in no way detracts from the testimony presented by the state which established Antone's guilt beyond and to the exclusion of every reasonable doubt. At best, the evidence was useful for impeachment of Haskew, but it is not germane to Antone's guilt or innocence. Further, and even more significant, evidence tending to impeach Haskew was already before the jury, and this evidence would have added little to defense efforts to show Haskew as a witness unworthy of the jury's belief. In addition, Haskew would have been entitled to counsel in any event, and there is no showing of any conspiracy between his counsel and the state. Upon our remand, the trial court found no evidence of deliberate prosecutorial misconduct. We agree. We find the undisclosed evidence clearly fails to meet the *Agurs* test of materiality, and a new trial is therefore not required.[5]

5. In a federal prosecution arising from the murder of Cloud, the Fifth Circuit held that Haskew's false testimony concerning payment of attorney's fees did not require a new trial, because revelation of the fact that such fees were paid by the state would not reasonably have affected the judgment of the jury. *See United States v. Antone*, 603 F.2d 566 (5th Cir. 1979).

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C. *The Sentencing Phase*

[27-30] It is our duty to examine the record in this cause and determine whether there are clear and convincing facts which warrant the imposition of the death penalty. In accepting the jury recommendation and imposing the death penalty, the trial judge found four statutory aggravating factors: (1) Antone had been convicted of two felonies involving the threat of violence to a person, specifically two armed robberies, which we find is appropriately an aggravating circumstance under section 921.141(5)(b); (2) the murder had been committed for pecuniary gain in that Antone received at least $750 for his share of this contract killing, and we find this is an appropriate aggravating circumstance under section 921.141(5)(f); (3) the murder was committed to disrupt and hinder the enforcement of laws in that it prevented the victim from testifying before a grand jury, and we find this is an appropriate aggravating circumstance under section 921.141(5)(g); and (4) this murder was especially heinous, atrocious, and cruel in the manner in which it was carried out. Because of our recent decisions, there may be a question whether this is an appropriate aggravating circumstance. *See, e. g., Cooper v. State*, 336 So.2d 1133 (Fla.1976).

[31] The trial court found no mitigating circumstances, and we agree that the record supports this finding. The appellant asserts that he was only an accomplice in a capital felony committed by another person and that his participation was relatively minor. This contention is without merit. The facts in this case are clearly distinguishable from the facts and circumstances in *Slater v. State*, 316 So.2d 539 (Fla.1975). Antone was the mastermind of this operation. He supplied the gun, paid the money from his pocket, and pressured Haskew to complete the task. His participation cannot under any view of this record, be termed minor. Without Antone's participation, the murder would not have come to fruition.

[32, 33] Because we fully approve the first three aggravating circumstances and find no mitigating circumstances, it is not necessary to consider the appropriateness of the trial court's finding that the murder was heinous, atrocious, or cruel. An error in finding this aggravating circumstance does not invalidate the imposition of the death sentence. *Elledge v. State*, 346 So.2d 998 (Fla.1977); *Alford v. State*, 307 So.2d 433 (Fla.1975). The three approved aggravating circumstances are clearly sustained by the record in this case, and there are no appropriate mitigating factors that should be taken into consideration.

For the reasons expressed, we affirm the conviction of Anthony Antone for the murder of Richard Cloud and agree that the death penalty is clearly an appropriate punishment in this cause.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON and SUNDBERG, JJ., concur.

Mary Hall WILLIAMS and Willet Williams, her husband, Petitioners,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Foreign Corporation, Respondent.

No. 52115.

Supreme Court of Florida.

April 17, 1980.

Rehearing Denied May 27, 1980.

Woman injured in automobile accident caused by the negligence of another driver sued her automobile liability insurer for damages which exceeded the full amount of

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA. CRIMINAL DIVISION.

STATE OF FLORIDA,

v.

ANTHONY ANTONE.

Case No. 76-1356
Division D

JAN 25 11 [illegible] '82

ORDER AND FINDINGS DENYING
MOTIONS FOR POST CONVICTION RELIEF

On January 6, 1982, the Governor of the State of Florida signed a death warrant requiring the execution of Anthony Antone within the week of Friday, the 29th of January and noon Friday, the 5th of February, 1982. On January 15, 1982 a Motion for Post Conviction Relief was filed on behalf of Mr. Antone by Messrs. Angelo Ferlita and Robert Nutter. At the request of the State of Florida, an informal pre-evidentiary hearing was held in Chambers relative to that Motion. In addition to the above named attorneys, Mr. Tom McCoun, Attorney, was also present. The Motion filed by Messrs. Ferlita and Nutter alleged, essentially, that (1) there was newly discovered evidence which entitled Mr. Antone to a new trial; (2) that the State of Florida had withheld exculpatory evidence from the defense at the time of Mr. Antone's trial and (3) that the prosecution had violated Florida Rule of Criminal Procedure 3.220 (a)(1)(i) by failing to furnish the name and address of a witness. It was agreed that until the Supreme Court of Florida allowed leave for permission to apply for a Writ of Coram Nobis this court did not have jurisdiction to entertain the newly discovered evidence issue; nevertheless, that issues (2) and (3) above could be considered by way of a Motion filed under Florida Rule of Criminal Procedure 3.850. Consequently, it was agreed that although all three issues involved

the same factual matter that an evidentiary hearing be held as to issue (2) and (3) above on January 21, 1982 at 3:00 P.M.

At this pre-evidentiary hearing, it was brought out that Mr. McCoun was also representing Mr. Antone and that he was planning, or contemplating, filing another Motion for Post Conviction Relief raising other issues, among them, the issue of ineffective assistance of counsel. This court instructed Mr. McCoun that if he was going to file such a Motion to do so as soon as possible and that any matters requiring an evidentiary hearing would also be held on January 21, 1982.

On January 19, 1982, Mr. Antone, through Mr. McCoun filed another Motion for Post Conviction Relief raising other matters, among them being one alleging the ineffective assistance of his state trial counsel.

These issues came on for hearing on January 21, 1982. The hearing was conducted in two phases. The first phase involved the Motion filed by Messrs. Ferlita and Nutter and the second phase the Motion filed by Mr. McCoun.

The Ferlita and Nutter Motion

This Motion was predicated on the testimony of one Robert Bruns. It can be said that Mr. Bruns was the witness that "cracked" the murder of Detective Cloud. One Benjamin Gilford began associating and, for a time, living with Mr. Bruns in Bradenton, Florida. He told Mr. Bruns that he was the person who had actually committed the Cloud murder and that this was but one of a series of murders that he had been hired to commit. It appears that sometime in February of 1976 Mr. Bruns was arrested on a traffic offense. During this incarceration, he made contact with law enforcement officers and reported to them what Gilford had told him. Bruns was asked to assist the F.B.I. and State officials in obtaining more information pertaining to the Cloud

murder. To this end he agreed to have electronic monitoring devices placed on his person, home and van. This was done for some three days beginning February 21, 1976. Subsequently, Gilford was arrested and charged with the murder. Thereafter, Ellis Marlow Haskew and Anthony Antone were arrested.

The difficulty began, it appears, after the Governor signed Antone's death warrant. Bruns contacted Attorney Ferlita and in a deposition told Messrs. Ferlita and Nutter that Gilford had told him that while Antone did provide the money after the murder that Antone did not know anything about the Cloud murder until after it had occurred; that when he learned why Victor Acosta had given him this money he became upset and hesitated in making the payment. This deposition was attached as an Exhibit to the Motion filed by Messrs. Ferlita and Nutter wherein they contended that the State had withheld exculpatory evidence from the defense and had violated Rule 3.220 (a)(1)(i) in not listing Bruns as a witness pursuant to a defense demand for discovery.

Numerous witnesses testified before me at this hearing, among them Bruns, E. D. Williams of the Tampa Police Department, David Malarney and Jim Blatley of the F.B.I. and Aaron Bowden, the Attorney who prosecuted the case in behalf of the State of Florida.

While continuing to insist that Gilford had told him that Antone did not know anything about the Cloud murder until after it occurred, Bruns readily admitted that he never told any law enforcement official, either State or Federal, of this fact. His testimony was that since his conversations with Gilford were monitored and recorded they must have heard it. Prior to the hearing, copies of the tape recordings were delivered to Messrs. Ferlita and Nutter. From the testimony and representations made to this court it is manifest that the recordings were inaudible.

None of the witnesses who testified that they participated in the monitoring of the conversations between Gilford and Bruns could testify that they heard any such conversations primarily because the conversations were difficult to hear while they were monitoring.

Furthermore, Bruns testified that prior to his being equipped with those monitoring devices, he talked with Agent David Malarney of the F.B.I. on February 20, 1976. Agent Malarney testified that on that date and time Bruns told him that Gilford had related to him that Haskew and Gilford were hired to do the shooting by an individual known to Gilford as "Anthony" and that "Anthony" had supplied the murder weapon. While Gilford did not know who Anthony was, he did have his telephone number. Agent Malarney testified that when Gilford was arrested he had on his person a telephone number to an "Anthony" which turned out to be Anthony Antone.

E. D. Williams of the Tampa Police Department also testified that in a conversation with Bruns, Bruns related that Gilford had told him that the murder had been set up by one "Anthony".

Aaron Bowden, the Attorney who prosecuted the case for the State of Florida, admitted that Bruns' name was not placed on any witness list, but stated that there was no malicious purpose behind this. His reasoning was first, that Bruns' testimony while incriminating Antone was inadmissible because rank hearsay; and, second, because he was not aware of any exculpatory or favorable evidence to Antone that Bruns could provide. Bruns' name was apparently listed as a witness in the case against Benjamin Gilford because his deposition was taken on June 2, 1976 by Mr. Richard C. Edwards, Assistant Public Defender, representing Gilford.

After hearing the testimony and considering the arguments of counsel, Memorandum of Law, the briefs on appeal, the decision of the Supreme Court of Florida in Antone v. State, 355 So.2d 777

(Fla. 1977) and otherwise being fully advised in the premises; I find:

1. That prior to the trial of Anthony Antone and until such time as Robert Bruns made the above described disclosures to Messrs. Ferlita and Nutter, no State or Federal official was aware of any possible exculpatory or favorable evidence that Mr. Bruns could provide in behalf of the defendant, Anthony Antone; thus neither the precepts of Brady v . Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 nor any of its progeny were violated. Furthermore, I find, in view of the questionable admissibility of Bruns' testimony and in view of the overwhelming evidence produced at defendant's trial, that even if there had been, which there was not, a specific request for this evidence there is no reasonable likelihood that it could have affected the outcome of the trial or sentence. See United States v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976).

2. That while there was a technical violation of Florida Rule of Criminal Procedure 3.220 (a)(1)(i), the violation was not wilfull or malicious and the defendant Antone was not harmed nor prejudiced by this violation. Bruns was not used as a witness by the State. The admissibility of his alleged exculpatory testimony is highly questionable and even if it would have been admissible it is patently unbelievable in view of all of the facts surrounding this case. Consequently, as with the alleged "Brady" violation, I find that even if his name had been furnished to the defense under the rules of discovery, there is no likelihood it could have affected the outcome of the trial or sentence.

The McCoun Motion for Post Conviction Relief

After hearing the Ferlita and Nutter Motion, the Court took up the matter of the McCoun Motion. At the outset, Mr. McCoun requested a continuance and asked this court to appoint some experts so that they could review and analyze the record and files and

testify with respect to the effectiveness of Mr. Antone's representation at his trial. This request for a continuance was vigorously opposed by the State. In view of the fact that the Supreme Court of the United States had denied certiorari on October 14, 1980 and denied rehearing on December 8, 1980 and the fact that no proceedings for post conviction relief were instituted by Mr. Antone throughout the year between the time certiorari was denied and the Governor signing the warrant and in fact were not instituted until after the warrant was signed, I denied the requested continuance.

I also denied the request for the appointment of experts. Mr. McCoun wanted attorneys called as experts to testify with respect to ineffectiveness. The Florida Evidence Code 90.702 provides that an expert may be used if scientific, technical or other specialized knowledge would assist the trier of the fact in understanding the evidence. As an Attorney, former Assistant State Attorney and Circuit Judge, I did not deem it necessary to have an expert assist me in understanding the evidence. Consequently, I denied the Motion for the appointment of experts.

Mr. Antone, through his counsel, Mr. McCoun, called two witnesses to testify. The first was Antone, himself who testified briefly to the effect that he was arrested at his home without a warrant.

The second witness that was called was Mr. Richard C. Edwards, the attorney who represented Benjamin Gilford. He testified that there was extensive publicity surrounding the Cloud murder and while Gilford pled guilty he asked for a change of venue as to the sentencing phase. He opined that in a case such as Antone's a change of venue should be requested. An Exhibit containing photostatic copies of newspaper clippings concerning the Cloud murder were also introduced in evidence. On cross-examination he admitted that one consideration militating against

requesting a change of venue would be the ties in the community of the defendant and/or his attorneys.

In rebuttal by the State, James Alfonso, Attorney, testified that he assisted Mr. Ferlita in the preparation and trial of the case and that they actively considered and discussed with Mr. Antone whether to ask for a change of venue. Mr. Antone, himself was opposed because he and his attorneys were relatively well known in the community and they could not assure him where the new venue would be if a request were granted.

Mr. Edwards also testified that in his opinion, a defense attorney, in a capital case should be ever vigilant to assure that no juror is excused for cause in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), but admitted he was unfamiliar with the jury selection procedures that occurred in the Antone case.

At the request of the State, I personally reviewed the transcript of the jury selection. I find that the jury was relatively easy to select; that few jurors had read or heard about the case or if they had, formed an opinion and that no juror was improperly excused for cause in violation of Witherspoon.

At the conclusion of the testimony, I again inquired of Mr. McCoun whether there was any further testimony to present on ineffectiveness and that if he wished to call Mr. Ferlita who was present and to make any inquiries of him on the issue of ineffectiveness he was free to do so. Mr. McCoun declined.

I therefore make the following findings, based on the evidence presented, memorandums, briefs of counsel on appeal and a review of the record:

1. That Anthony Antone was represented by reasonably competent and effective counsel and did in fact receive in preparation of, and during the course of his trial, effective assistance of counsel. In making this finding, I am cognizant

that his was a capital case and am considering this fact in my overall determination of this finding. Washington v. Watkins, 655 F. 2d 1346 (5th Cir. 1981).

2. That his counsel did not render ineffective assistance by virtue of not having requested a change of venue inasmuch as this was a considered decision between attorney and client, Catches v. United States, 582 F. 2d 453 (8th Cir. 1978), Reynolds v. Mabry, 574 F. 2d 978 (8th Cir. 1978), nor do I find from the evidence presented or a review of the record that counsel was ineffective with respect to Witherspoon. My perusal of the record discloses that each and every juror that was excused for cause was justifiably excused.

Ineffective Assistance of Counsel on Appeal

As to this issue I find that I am without jurisdiction to consider. See Knight v. State, 394 So.2d 997 (Fla. 1981).

In addition to his ineffectiveness claims, Mr. McCoun raised several other issues: I find that these were issues that were properly raisable on direct appeal and therefore not subject to collateral attack. State v. Matera, 266 So.2d 661 (Fla. 1972); Meeks v. State, 382 So.2d 673 (Fla. 1980); Goode v. State, 403 So.2d 931 (Fla. 1981); Witt v. State, 387 So.2d 922 (Fla. 1980).

These issues were:

1. That the precepts of Witherspoon v. Illinois, 391 U.S. 510 (1968) were violated;

2. That Antone was arrested at his home without a warrant in violation of Payton v. New York, 445 U.S. 373 (1980);

3. That Antone had been denied a fair trial by virtue of sundry trial errors; and

4. That the judgment and sentence of death violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

On the Payton issue, counsel for Antone contended that since there was a change in the law, it could now be raised by way of 3.850. But to my knowledge, neither the Supreme Court of Florida nor the Supreme Court of the United States has held Payton to be retroactive. Until either one or the other does so, I feel I am bound by the decision of Witt v. State, supra. At the time of Antone's trial the law in Florida was that an arrest of one in his home without a warrant did not violate the Fourth Amendment. State v. Perez, 277 So.2d 778 (Fla. 1973), certiorari denied 414 U.S. 1064, 38 L. Ed. 2d 468.

I am hereby directing the Clerk of this Court to immediately prepare and certify the record of these proceedings including the pleadings and other orders entered by this court pertaining to these proceedings and cause them to be delivered to the Supreme Court of Florida post haste.

DONE AND ORDERED this 25 day of January, 1982.

Circuit Judge

or without any questions being asked, told the officers that the boat was loaded with marijuana. At that time the officers clearly had probable cause to believe that the defendants' boat was carrying marijuana. The boat itself was fully mobile, and the question of whether it could have been secured is irrelevant. *Chambers v. Maroney*.

Completely independent of the *Carroll* exception, I believe the search of the hold was within the constitutionally permissible scope of the search-incident-to-arrest exception. In *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the Supreme Court of the United States held that where there has been a lawful custodial arrest, the officers are justified in making a contemporaneous warrantless search of the arrested person in order to remove any weapons that the arrestee may seek to use in order to effect his escape or resist arrest and in order to seize any evidence on the arrestee's person to prevent its concealment or destruction. The court also held proper a 'contemporaneous search of the area immediately surrounding the arrestee for the same purposes. These searches may be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy the evidence since the potential dangers lurking in all custodial arrests make warrantless searches of items within the "immediate control" area reasonable. The arresting officer is not required to calculate the probability that weapons or destructible evidence may be involved. *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). The fact of lawful arrest, alone, authorizes the warrantless search. *Michigan v. DeFellippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979).

Acknowledging the difficulty courts have encountered in respect to the proper scope of what is meant by the area within the immediate control of an arrestee, particularly in automobile cases, the Supreme Court of the United States in *New York v. Belton*, 449 U.S. 1109, 101 S.Ct. 917, 66 L.Ed.2d 838 (1981), held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, incident to the arrest, contemporaneously search the passenger compartment of that automobile. This includes, explained the court, a search of any containers found within the passenger compartment whether the container is opened or closed. In *Belton*, the occupants of the car had been ordered to get out of the car and had been placed under arrest prior to the officer's searching of the passenger compartment.

In the present case, there is no question that the search was conducted immediately upon arrest of the defendants, and the hold of the boat was easily accessible to the defendants. It is not inconceivable that the defendants may have had weapons hidden in the hold or that armed accomplices could have been hiding there, merely waiting an opportunity to surprise the officers and to thwart the arrest of defendants. Likewise, it is not inconceivable that defendants could have quickly reached the hold and attempted to destroy the evidence by throwing it overboard.

Accordingly, I would hold that the stop and search and seizure were constitutional, and therefore I would quash the decision of the district court.

McDONALD, J., concurs.

Anthony ANTONE, Petitioner/Appellant,

v.

STATE of Florida, Respondent/Appellee.

Nos. 61594, 61621 and 61622.

Supreme Court of Florida.

Jan. 28, 1982.

On writs of error coram nobis and habeas corpus and on appeal from denial by

the Circuit Court, Hillsborough County, Arden M. Merckle, J., of defendant's motions for postconviction relief, the Supreme Court held that: (1) newly discovered evidence, which would have had effect of impeaching defendant's own testimony and change totally his theory of defense, did not meet test of coram nobis that the alleged facts must be of such vital nature that had they been known to trial court they conclusively would have prevented entry of the judgment; (2) trial judge's ruling that there was no actual suppression of favorable evidence by the State was supported by the evidence; and (3) State's failure to disclose name of its witness was not so prejudicial that it required vacation of judgment and sentence.

Motions denied; order affirmed.

1. **Criminal Law** ⇐997.8

Newly discovered evidence, which would have had effect of impeaching defendant's own testimony and change totally his theory of defense, did not meet test of coram nobis that the alleged facts must be of such a vital nature that had they been known to trial court they conclusively would have prevented entry of the judgment.

2. **Criminal Law** ⇐1158(4)

Trial judge's ruling that there was no actual suppression of favorable evidence by the State was supported by the evidence.

3. **Constitutional Law** ⇐268(5)

In absence of actual suppression of favorable evidence, prosecution does not violate due process by denying discovery. U.S.C.A.Const.Amend. 14.

4. **Criminal Law** ⇐1166(1)

Prosecution's failure to disclose name of its witness was not so prejudicial so as to require vacation of defendant's judgment of conviction and sentence. West's F.S.A. Rules Crim.Proc., Rule 3.220.

5. **Criminal Law** ⇐998(3)

Any issue concerning selection of defendant's jury could have been raised in his first appeal to the Supreme Court and was not a matter that would support a collateral attack.

6. **Courts** ⇐100(1)

Decision involving warrantless seizure of inculpatory evidence appearing in plain view after officers broke into suspect's home at a time when suspect was not there was not a "change of law" to be retroactively applied to situation of defendant, who was arrested in his residence without a warrant.

7. **Criminal Law** ⇐641.13(1, 7)

Defendant was provided reasonably effective assistance of counsel in all stages of his trial and appeal.

8. **Criminal Law** ⇐998(3)

Issue concerning jury instructions as to mitigating factors could have been raised in defendant's first appeal to the Supreme Court and was not a matter which would support collateral attack.

Thomas D. McCoun, III of Louderback & McCoun, St. Petersburg, for petitioner/appellant.

Jim Smith, Atty. Gen., George R. Georgieff, Asst. Deputy Atty. Gen., Tallahassee, and Charles Corces, Jr., Asst. Atty. Gen., Tampa, for respondent/appellee.

PER CURIAM.

We have for our consideration a motion for stay of execution, a petition for writ of error coram nobis asking the Court to grant a new trial on grounds of newly discovered evidence, and an expedited appeal from a denial of two motions for post-conviction relief under Florida Rule of Criminal Procedure 3.850. The factual bases for the coram nobis petition are also included in the grounds of one of the motions for 3.850 relief. This Court originally affirmed the conviction and sentence of death in our decision reported as *Antone v. State*, 382 So.2d 1205 (Fla.), *cert. denied*, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980). A detailed statement of the facts of this case is contained in that opinion. For the rea-

sons expressed, we deny the relief requested and deny the motion for stay of execution.

In this consolidated proceeding, appellant seeks relief claiming (1) newly discovered evidence which assertedly is exculpatory and was withheld by the state in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); (2) the exclusion of certain prospective jurors contrary to the principles of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); (3) the warrantless arrest of appellant Antone in his home in violation of the principles announced in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); (4) multiple errors in the original trial; (5) ineffective assistance of counsel; and, (6) the failure of the trial court in the penalty phase to properly instruct the jury concerning the mitigating circumstances it could consider in making its recommendation to the trial judge. The trial court denied relief on the 3.850 motions after a full evidentiary hearing. In that proceeding, counsel for both parties agreed that the trial judge had no jurisdiction of the coram nobis application, that jurisdiction being solely in the Supreme Court of Florida.

The trial court, in denying relief on the issue of newly discovered evidence and on the assertion that the state improperly withheld exculpatory evidence, made the following factual findings:

> This Motion was predicated on the testimony of one Robert Bruns. It can be said that Mr. Bruns was the witness that "cracked" the murder of Detective Cloud. One Benjamin Gilford began associating and, for a time, living with Mr. Bruns in Bradenton, Florida. He told Mr. Bruns that he was the person who had actually committed the Cloud murder and that this was but one of a series of murders that he had been hired to commit. It appears that sometime in February of 1976 Mr. Bruns was arrested on a traffic offense. During this incarceration, he made contact with law enforcement officers and reported to them what Gilford had told him. Bruns was asked to assist the F.B.I. and State officials in obtaining more information pertaining to the Cloud murder. To this end he agreed to have electronic monitoring devices placed on his person, home and van. This was done for some three days beginning February 21, 1976. Subsequently, Gilford was arrested and charged with the murder. Thereafter, Ellis Marlow Haskew and Anthony Antone were arrested.
>
> The difficulty began, it appears, after the Governor signed Antone's death warrant. Bruns contacted Attorney Ferlita and in a deposition told Messrs. Ferlita and Nutter that Gilford had told him that while Antone did provide the money after the murder that Antone did not know anything about the Cloud murder until after it had occurred; that when he learned why Victor Acosta had given him this money he became upset and hesitated in making the payment. This deposition was attached as an Exhibit to the Motion filed by Messrs. Ferlita and Nutter wherein they contended that the State had withheld exculpatory evidence from the defense and had violated Rule 3.220(a)(1)(i) in not listing Bruns as a witness pursuant to a defense demand for discovery.
>
> Numerous witnesses testified before me at this hearing, among them Bruns, E. D. Williams of the Tampa Police Department, David Malarney and Jim Blatley of the F.B.I. and Aaron Bowden, the Attorney who prosecuted the case in behalf of the State of Florida.
>
> While continuing to insist that Gilford had told him that Antone did not know anything about the Cloud murder until after it occurred, Bruns readily admitted that he never told any law enforcement official, either State or Federal, of this fact. His testimony was that since his conversations with Gilford were monitored and recorded they must have heard it. Prior to the hearing, copies of the tape recordings were delivered to Messrs. Ferlita and Nutter. From the testimony

and representations made to this court it is manifest that the recordings were inaudible. None of the witnesses who testified that they participated in the monitoring of the conversations between Gilford and Bruns could testify that they heard any such conversations primarily because the conversations were difficult to hear while they were monitoring.

Furthermore, Bruns testified that prior to his being equipped with those monitoring devices, he talked with Agent David Malarney of the F.B.I. on February 20, 1976. Agent Malarney testified that on that date and time Bruns told him that Gilford had related to him that Haskew and Gilford were hired to do the shooting by an individual known to Gilford as "Anthony" and that "Anthony" had supplied the murder weapon. While Gilford did not know who Anthony was, he did have his telephone number. Agent Malarney testified that when Gilford was arrested he had on his person a telephone number to an "Anthony" which turned out to be Anthony Antone.

E. D. Williams of the Tampa Police Department also testified that in a conversation with Bruns, Bruns related that Gilford had told him that the murder had been set up by one "Anthony."

Aaron Bowden, the Attorney who prosecuted the case for the State of Florida, admitted that Bruns' name was not placed on any witness list, but stated that there was no malicious purpose behind this. His reasoning was first, that Bruns' testimony while incriminating Antone was inadmissible because rank hearsay; and, second, because he was not aware of any exculpatory or favorable evidence to Antone that Bruns could provide. Bruns' name was apparently listed as a witness in the case against Benjamin Gilford because his deposition was taken on June 2, 1976 by Mr. Richard C. Edwards, Assistant Public Defender, representing Gilford.

Upon these facts, the trial judge ruled as follows:

1. That prior to the trial of Anthony Antone and until such time as Robert Bruns made the above described disclosures to Messrs. Ferlita and Nutter, no State or Federal official was aware of any possible exculpatory or favorable evidence that Mr. Bruns could provide in behalf of the defendant, Anthony Antone; thus neither the precepts of *Brady v. Maryland*, 373 U.S. 831, 83 S.Ct. 1194, 10 L.Ed.2d 215 nor any of its progeny were violated. Furthermore, I find, in view of the questionable admissibility of Bruns' testimony and in view of the overwhelming evidence produced at defendant's trial, that even if there had been, which there was not, a specific request for this evidence there is no reasonable likelihood that it could have affected the outcome of the trial or sentence. See *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

2. That while there was a technical violation of Florida Rule of Criminal Procedure 3.220(a)(1)(i), the violation was not wilfull or malicious and the defendant Antone was not harmed nor prejudiced by this violation. Bruns was not used as a witness by the State. The admissibility of his alleged exculpatory testimony is highly questionable and even if it would have been admissible it is patently unbelievable in view of all of the facts surrounding this case. Consequently, as with the alleged "Brady" violation, I find that even if his name had been furnished to the defense under the rules of discovery, there is no likelihood it could have affected the outcome of the trial or sentence.

The trial judge further determined that counsel was reasonably effective, finding:

1. That Anthony Antone was represented by reasonably competent and effective counsel and did in fact receive in preparation of, and during the course of his trial, effective assistance of counsel. In making this finding, I am cognizant that his was a capital case and am considering this fact in my overall determination of this finding. *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981).

2. That his counsel did not render ineffective assistance by virtue of not having requested a change of venue inasmuch as this was a considered decision between attorney and client, *Catches v. United States*, 582 F.2d 453 (8th Cir. 1978), *Reynolds v. Mabry*, 574 F.2d 978 (8th Cir. 1978); nor do I find from the evidence presented or a review of the record that counsel was ineffective with respect to *Witherspoon*. My perusal of the record discloses that each and every juror that was excused for cause was justifiably excused.

The trial judge concluded by rejecting the contention that the recent United States Supreme Court decision in *Payton v. New York*, decided four years after Antone's trial, required a reversal for a new trial and by finding that the other contentions were not proper for collateral relief since they dealt with issues which could have been raised on the initial appeal before this Court.

We are in total accord with the findings of the trial judge and commend him for the manner in which he detailed his reasons in his order. Because of the nature of this proceeding, we deem it appropriate to fully discuss the principal issue argued concerning the asserted newly discovered evidence which the witness Robert Bruns brought to the attention of the attorneys for appellant Antone, and the resulting assertion that the failure of the state to disclose Robert Bruns as a witness was a fatal error under *Brady* and our rules of criminal procedure requiring a reversal and a new trial.

The testimony of the newly discovered witness, Bruns, is accurately reflected in the trial court's findings. It is clear that Bruns never told any law enforcement official, either state or federal, that Gilford told him that Antone only participated in the murder after the fact and that Antone's only involvement was reluctantly paying the money after Cloud was killed. These conversations allegedly occurred on or about February 20, 1976, and Bruns testified by deposition in Gilford's proceeding. Gilford pleaded guilty in June of 1976, and, one month later, committed suicide. Appellant's trial commenced on August 23, 1976.

It was clearly established in three separate parts of the testimony of Haskew, the state's primary witness in Antone's original trial, that Victor Acosta was the moneyman who wanted the victim, Detective Cloud, killed. First, Haskew testified that Antone had told him that Victor Acosta wanted five people killed when he asked Haskew to come to Tampa. Next, Haskew testified that Antone had called Haskew to his house and asked him to try out a .32 automatic with a silencer that Acosta had furnished Antone. And, finally, Haskew testified that ten days prior to the murder Antone had told him that Acosta was insistent that Cloud be killed because he was afraid that Cloud was going to be reinstated as a police officer.

The original trial testimony establishes that Antone hired Gilford and Haskew to kill Detective Cloud, directed them to Cloud's residence, furnished them with a pistol with a silencer which was packed with fiber from an air-conditioning filter found at Antone's home, and that Antone had this weapon tested in his home by having it fired into a couch in his den. These facts, established by Haskew's testimony, were corroborated by the presence of a bullet in the couch which matched the bullet that killed Detective Cloud and by the discovery in Antone's shed of blue air-conditioner filter fiber which matched that used in the silencer. Bruns' testimony that Antone was the middleman was not new evidence; that fact had been established during the course of the original trial testimony. Antone was a middleman who organized, set up, and masterminded the actual killing.

The claim that Gilford told Bruns that Antone didn't know about the killing until after it occurred was not known by the enforcement or prosecutorial officials. Further, it was not even asserted as a defense in the trial or penalty phase that Antone was only a participant after the fact. An examination of the entire record in this case, particularly an examination of

appellant's own testimony, reflects that this was not the theory of the defense. Appellant Antone not only denied having "anything to do with the Richard Cloud killing," but also, in his direct testimony, responded to the question, "... did you ever meet or know a man by the name of Buck Gilford?", by answering, "*No, I've never met him.*" In effect, what appellant Antone is attempting to do in this proceeding is to offer, through the testimony of Bruns, the statement of Gilford to impeach his own testimony and to change totally his theory of defense.

[1] In addition, Gilford, whose statement was simply repeated by Bruns, committed suicide prior to this trial and, consequently, the admissibility of Bruns' testimony under these circumstances is questionable. Assuming that it would have been admissible in either the trial or penalty phase, given the totality of the evidence in the original case, we find that this newly discovered evidence still does not meet the test of coram nobis which requires "that the alleged facts must be of such a vital nature that had they been known to the trial court, they *conclusively* would have prevented the entry of the judgment." *Hallman v. State*, 371 So.2d 482, 485 (Fla.1979).

[2, 3] Next, with reference to the asserted failure of the state to advise Antone of this allegedly exculpatory evidence, we fully agree with the finding of the trial judge that the state did not have knowledge of Gilford's statement to Bruns regarding Antone's ignorance of Cloud's murder until after it occurred and his after-the-fact participation in paying the money. The ruling of the trial judge is supported by the evidence, and we find there was no actual suppression of favorable evidence by the state. The law is clear that in the absence of actual suppression of favorable evidence, the prosecution does not violate due process by denying discovery. *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The next issue raised concerns a violation of our criminal rules of discovery. We recognize that under Florida Rule of Criminal Procedure 3.220, the prosecutor is required to disclose to defense counsel the names and addresses of all persons known to the prosecutor to have "information which may be relevant to the offense charged, and to any defense with respect thereto." Our rule of discovery is a procedural rule which requires reciprocal action by the defendant as well as the prosecution, and it has been approved by the United States Supreme Court. *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). The purpose of this procedural discovery rule is to make our criminal justice system more efficient by avoiding multiple adversary pretrial evidentiary hearings previously used by defendants to obtain discovery information.

[4] The issue on this point is whether the failure to disclose the name of the witness Bruns was so prejudicial that it requires a vacation of the judgment and sentence. Although the trial judge found that Bruns' name should have been made known to the defense under our procedural rule, we find that the appellant was not prejudiced in his defense by the lack of this information. We note that the person making the statement was dead at the time of the trial and that Antone denied at the trial ever having known him. Under the circumstances of this case, we find neither a constitutional violation of the *Brady* doctrine nor prejudice to appellant by the procedural violation of our discovery rules.

[5] The claim by appellant that the prosecution excluded all jurors with death penalty scruples by using both its peremptory challenges and its challenges for cause, thus circumventing the principle established in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), is without merit. *Dobbert v. State*, 409 So.2d 1053, (Fla.1982). Any issue concerning this specific jury selection could have been raised in Antone's first appeal to this Court, and this is not a matter that will support a collateral attack. *Spenkelink v. State*, 350 So.2d 85 (Fla.), *cert. denied*, 434 U.S. 960, 98 S.Ct.

492, 54 L.Ed.2d 320 (1977); *Sullivan v. State*, 372 So.2d 938 (Fla.1979).

[6] Appellant further contends that the judgment and sentence are unconstitutional because Antone was arrested without a warrant in his residence, contrary to the decision of the United States Supreme Court in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Appellant argues that, even though *Payton* was decided four years after appellant's conviction and sentence, the law announced in that case should be given retroactive application. First, it should be noted that *Payton* is distinguishable from the instant case. In *Payton*, the officers acted without a warrant and, after breaking into Payton's home looking for him, saw and seized inculpatory evidence that appeared in plain view. Payton was not even present at the time. In the instant case, although Antone was arrested without a warrant in his own home, nothing was seized at the time of his arrest. The seizure of items within the premises was accomplished under a search warrant based almost entirely on information acquired prior to Antone's arrest. Further, we believe that our decision in *Witt v. State*, 387 So.2d 922 (1980), controls and that *Payton* is not a "change of law" which requires retroactive application.

[7] The multiple asserted errors made by the trial court in the original proceeding are matters that could have been raised in the first appeal to this Court and do not support a collateral attack. *Spenkelink; Sullivan*. We also reject the claims of ineffective assistance of trial and appellate counsel. For the purposes of this proceeding, we treat the issue of ineffective assistance of appellate counsel as a petition for writ of habeas corpus. After another careful review of the record, we find that there was no substantial deficiency of counsel in either the trial or appellate portion of this cause. Under the test we enunciated in *Knight v. State*, 394 So.2d 997 (1981), this appellant was provided reasonably effective assistance of counsel in all stages of this proceeding.

[8] Finally, appellant asserts that the trial court limited jury consideration of mitigating factors to those set forth in the statute. From our review of the record, no limitation was placed on appellant at the time of the original trial, and no showing has been made that he was denied an opportunity to present to the jury any mitigating evidence. The appellant did not request that any additional mitigating factors be included in the instructions, and the standard jury instruction in force at the time of trial was presented without objection. That instruction did not expressly limit the mitigating factors to those identified in the statute. Again, this was an issue that could have been raised in appellant's first appeal to this Court and is not a matter which may support collateral attack. *Spenkelink; Sullivan*.

The petition for writ of coram nobis is denied, and the order of the trial court denying appellant Antone's motions for 3.850 relief is affirmed. We also deny the claim of ineffective appellate counsel, which we treat as habeas corpus. Finally, the motion for stay of execution is denied. No motions for rehearing will be entertained.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANTHONY ANTONE, Petitioner, vs. CLAYTON STRICKLAND, Superintendent, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary Florida Department of Offender Rehabilitation, and JIM SMITH, Attorney General, State of Florida, Respondents.	Case No: 80-T-82-61-TCC.

PETITION FOR WRIT OF HABEAS CORPUS

The Petitioner, ANTHONY ANTONE, by and through his undersigned attorneys, hereby petitions this Court for the issuance of a Writ of Habeas Corpus, pursuant to 28 U.S.C. §2241, and in support thereof, states:

I. HISTORY OF PRIOR STATE COURT PROCEEDINGS

1. The Judgment and Sentence of Death which is the subject of this proceeding was entered by the Circuit Court for the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, Tampa, Florida.

2. The date of the Judgment and Sentence of Death was August 27, 1976. Sentence was imposed on August 27, 1976.

3. Petitioner was sentenced to death upon conviction for Murder in the First Degree by the trial court's acceptance of the jury's recommendation of death. The trial judge presiding throughout Petitioner's trial was the Honorable Herboth S. Ryder, Circuit Judge.

4. Petitioner was convicted of Murder in the First Degree.

5. Petitioner entered a plea of Not Guilty to the offense charged.

6. Petitioner was afforded a trial by jury.

7. Petitioner did testify during the guilt phase of his bifurcated trial.

8. Petitioner appealed from the Judgment and Sentence of Death to the Supreme Court of Florida.

9(a). On February 16, 1978, the Supreme Court of Florida remanded Petitioner's cause to the trial court for determination of whether there had been a Brady and Agurs violation committed by the State prior to or during Petitioner's trial, Antone v. State, 355 So.2d 777 (Fla. 1978).

(b). The trial court, after holding an evidentiary hearing on the alleged Brady-Agurs violations denied relief.

(c). On March 27, 1980, the Supreme Court of Florida affirmed Petitioner's conviction and sentence, Antone v. State, 382, So.2d 1205 (Fla. 1980).

(d). A Petition for Writ of Certiorari filed in the United States Supreme Court to review the decision of the Supreme Court of Florida was denied without opinion on October 14, 1980, with two justices dissenting.

10. Other than the appeals described in Paragraphs 8 and 9, above, Petitioner has filed two additional challenges to his conviction and sentence. The first was an original habeas corpus proceeding in the Supreme Court of Florida in which the Petitioner joined with 122 other death-sentenced persons in challenging that court's review of extra-record material in capital appeals. Relief was denied. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied _____ U.S. _____, 30 Cr.L. 4066 (11/2/81).

11. On or about January 15, 1982, and January 20, 1982, Petitioner filed two, separate, Motions for Post-Conviction Relief in the Circuit Court for the Thirteenth Judicial Circuit, Hillsborough County, Florida. The issues raised in those motions are the same as the issues raised herein, except for issues previously raised in the proceedings described in Paragraph 8, 9, and 10, above. On January 21, 1982, a hearing was held before the Honorable Arden M. Merkle, Circuit Judge, for the Thirteenth Judicial Circuit of the State of Florida, who denied Petitioner's Motion for Post Conviction Relief and Motion to Vacate Sentence, as well as Motions for Appointment of Experts and an Application for Stay of Execution. Those Orders are in the process of being appealed to the Supreme Court of Florida.

Oral argument is presently scheduled in that Court for January 26, 1982.

II. NATURE OF THE RELIEF SOUGHT

The defendant seeks an Order vacating the sentences of death and an Order staying the execution of the judgment and sentence of the Court pending final disposition of this Motion.

III. STATEMENT OF THE FACTS

12. The Petitioner was tried and convicted of the First Degree Murder of Richard Cloud. The facts upon which the conviction was based show that Richard Cloud, a suspended police officer with the Tampa Police Department, was shot to death in his home on October 23, 1975. Witnesses at the scene could not identify the perpetrators but stated that a latin looking male holding a box was seen running from the Cloud residence and climbing in a car driven by another latin looking male (R1161-1167).

13. Thereafter, on February 25, 1976, Ellis Marlow Haskew was arrested in Miami, Florida by Larry Campbell of the Florida Department of Criminal Law Enforcement. After initial denials and after discussions regarding a possible deal, Haskew confessed to being the driver of the getaway car. Haskew implicated Buck Gilford as the triggerman. Haskew implicated the Petitioner as the person who gave him information regarding five contracts for murder from Vic Acosta; as the person who supplied the murder weapon and as the person who gave him money for the killing. Haskew, then made a phone call to the Petitioner, at his residence. Petitioner returned the call to Haskew at a pay phone. This conversation was tape recorded by Campbell. Thereafter, Antone was arrested without an arrest warrant, in his home at approximately 10:00 p.m. by a joint task force of agents from Tampa Police, the Florida Department of Criminal Law Enforcement, Hillsborough County Sheriff's Office, and the Federal Bureau of Investigation. These agents entered Petitioner's house with guns drawn, Petitioner was cuffed, and then dressed by police (R1277-1278)(R1585, 1592-1594), (R1707), (R2040-2043). Petitioner apparently

suffered what was later determined to be a mild myocardial infarction. In the subsequent interview that evening at the F.B.I. office, and Tampa General Hospital, Petitioner made the statement that he was a 100% Sicilian, and Sicilians didn't fink on anybody. He also asked if he was going to have to testify and, in another pre-arranged call to Haskew, asked, "Marlow why are you doing this to me." (R1585-1607). On February 26, 1976, a joint task force executed a search warrant at Petitioner's home and seized numerous items later used as evidence against the Petitioner, including a rattan couch, and a .32 calibre slug found therein, as well as air-conditioning filters taken from a separate workshop on Petitioner's property. (R1283, 1284; 1314-1328).

14. The Court refused a pre-trial motion for disclosure of a witness who claimed he had been recruited by Haskew to do a contract murder of a police officer and who stated that the Petitioner's name was never mentioned during these discussions with Haskew. At trial, the State produced physical evidence taken from the victim's residence, including .32 calibre slugs and casings, and box and glass fibers taken from the front door. (R1170-1198). Experts from the F.B.I. linked up the bullet taken from the victim's leg with the other slugs found in the victim's house and the one slug found inside the rattan couch at petitioner's residence. (R1437-1438). Further, expert testimony attempted to show a comparison between glass fibers found at the scene of the homicide and glass fibers seized in the search of the Petitioner's residence. (R1578).

15. Ellis Marlow Haskew testified at length regarding his criminal relationship with the Petitioner (R1452-1536). Haskew indicated it was Petitioner who in September, 1975, advised him that Vic Acosta had put out five contracts for murder, including one for the victim. (R1459-1461). Haskew testified that earlier, in June, 1975, he had other conversations with the Petitioner and Manuel Gispert, concerning contracts for murder. He further testified that pursuant to those discussions of June, 1975, he and Petitioner "placed a bomb under

the car of Manuel Garcia, and" (R1463). Haskew then testified that some 10 days prior to the victim's murder, the Petitioner told him that Vic Acosta wanted Cloud killed in order to prevent Cloud from being reinstated and to prevent him from testifying before a grand jury regarding Acosta and his operations. (R1480-1482).

16. Haskew further testified to constructing a box to be used in the murder to conceal the weapon and catch the ejected cartridges fired during the murder. Haskew, when asked whose idea it was to use the box, stated that, "I'm not certain. I know the idea Antone came up, he told me that they had sent Joe Bedami, and some other guy up to Maryland to..." (R1485). Haskew further testified that on February 25, 1976, after his arrest and at the insistence of Agents of the FDCLE and the F.B.I., he had a phone conversation with the Petitioner, in which he spoke with the Petitioner about counterfeit money. (R1507). A tape recording of this conversation was also introduced into evidence. (R1512).

17. Haskew went on to testify that he received the murder weapon from the Petitioner; that he had test fired it in the Petitioner's house by shooting it into the rattan couch. (R1474). He stated that they used glass fibers from the air conditioning filters in the Petitioner's workshop to repack the silencer which was on the gun. (R1476). He further stated he used more of this material later to repack the gun after he and Buck Gilford had test fired the weapon in anticipation of the murder. (R1483-1484).

18. Haskew stated that after the murder, the Petitioner supplied him with $7,000-$8,000 in cash for the killing. (R1499). Haskew was also allowed to testify to a conversation he had subsequent to the killing with the triggerman, Buck Gilford, regarding what had occurred during the actual murder. (R1492-1498).

19. F.B.I. Agent, Joe Arwine, testified to statements (related above) made by the Petitioner subsequent to his arrest. Richard Jantos then testified that the Petitioner had, in

October or November 1975, discussed with him the manufacturing and design of gun silencers and that Antone stated he had made one for Vic Acosta which he had test fired in his home. The witness denied ever possessing any silencer. (R1612-1614).

20. The Petitioner presented several witnesses to discredit Haskew's reputation for truth and veracity (R1653-1666). Petitioner also presented George Mims who stated he had seen Jantos in possession of a silencer. (R1678-1680). Larry Miller, testifying as a defense witness contradicted Haskew on whether or not they had test fired the gun together as Haskew had testified. (R1675). The Court allowed extensive cross-examination bearing on these witnesses credibility. The Petitioner testified and denied any involvement in the murder.

21. Subsequent to Antone's conviction, the State of Florida produced evidence that Marlow Haskew's attorney had received several thousand dollars in legal fees from law enforcement.

22. Recently, new evidence has come to light concerning the existence of additional witnesses and tangible evidence bearing upon this case. These matters are being raised in the trial court by one of the Motion's for Post-Conviction Relief cited in Paragraph 11, above, and will be more fully developed below.

23. Petitioner's retained counsel never moved prior to trial for a change of venue, in spite of the considerable pre-trial publicity attending this homicide.

24. During the selection of Petitioner's trial jury, six veniremen were excused either by peremptory challenge or for cause solely on account of their conscientious or religious scruples against the death penalty. Mr. Delgado (R983, 1000) Mrs. DeLaughter (R1028, 1029), Mrs. McCurdy (R1048, 1049), Mrs. Langsford (R1064, 1065), Mr. Minton (R1079, 1080); Mrs. Bradley (R1080, 1081).

25. During Voir Dire, Petitioners counsel made no inquiry regarding the death penalty. (R949-1095) Further, no objection was lodged against the prosecutor's questions

regarding the death penalty, or the Court's excusing for cause all those jury members questioned who voiced death penalty scruples. (R983, 1029, 1049, 1065, 1080, 1081).

During the penalty phase, the prosecutor argued four aggravating factors and no mitigating factors. He further argued "Those are the only mitigating factors under the statute. This defendant does not qualify for one mitigating factor, not one. He qualifies under four of the statutory aggravating factors." Petitioner's counsel argued that two statutory mitigating factors applied, but did not attempt to present evidence or argument or any other factors in mitigation. The Court used the standard jury instruction to instruct the jury regarding the death penalty and the jury returned an advisory verdict of death. (R1886-1922). Thereafter, the Petitioner was sentenced to death by the trial court judges. (R1925, 1926).

IV. GROUNDS FOR HABEAS CORPUS RELIEF

26. JURY SELECTION: WITHERSPOON ISSUES

The exclusion of each and every venireman who expressed philosophical or religious scruples against the infliction of the death penalty violated Petitioner's constitutional rights in that:

(a) The exclusions were inconsistent with the constitutional requirements for capital cases set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968); Maxwell v. Bishop, 398 U.S. 478 (1969); Mathis v. New Jersey, 403 U.S. 946 (1971); Davis v. Georgia, 429 U.S. 122 (1976); and Adams v. Texas, 100 S.C. 2521 (1980).

(b) The exclusion violated the Petitioner's Sixth and Fourteenth Amendment rights under the United States Constitution in that the defendant was denied a representative jury selected from a cross-section of the community to act as a fair and impartial arbiter. Witherspoon v. Illinois, supra, Glassen v. U.S., 315 U.S. 60.

(c) The exclusion, which had no reasonable or rational basis other than to preclude any person with death penalty scruples from sitting as a juror, were not in furtherance

of any legitimate State interest and denied the Petitioner his rights to due process and equal protection of the law in that such a jury panel could not, in fact, be a representative cross-section of the community.

(d) The complete exclusion of those veniremen who expressed death penalty scruples was contrary to the Eighth and Fourteenth Amendments to the United States Constitution as the resulting jury panel could not provide the "link between contemporary community values and the penal system," Woodson v. North Carolina, 428 U.S. 280 (1976), nor could such a jury express the conscience and opinion of a representative cross-section of the community, Witherspoon v. Illinois, supra.

(e) The exclusions of each and every juror with death penalty scruples by using both peremptory challenges and challenges for cause substantially circumvented the rule in Witherspoon, supra. The complete exclusion of that segment of the community holding death penalty scruples resulted in a jury which was biased in favor of capital punishment. "Culled of all who harbor doubts about the wisdom of capital punishment -- of all who would be reluctant to pronounce the extreme penalty -- such a jury can speak only for a distinct and dwindling minority" Witherspoon, supra, at 520.

See also: People v. Wheeler, 58 P.2d 748 (Calif.); Commonwealth v. Soares, 387 N.E. 2d 499 (Mass.); People v. Thompson, 435 N.Y. Supp. 2d 739 (N.Y.); Brown v. Louisiana, 371 So.2d 351 (La.). Wherein the courts have placed the burden upon the State to justify the complete and systematic exclusion of jurors with death penalty scruples.

27. ADMISSION OF STATEMENTS ILLEGALLY OBTAINED FROM PETITIONER -- PAYTON ISSUES

The Petitioner was arrested without an arrest warrant while inside his home at approximately 10:00 p.m. on February 25, 1976. The arrest was effected by a joint task force of the Tampa Police Department, Hillsborough County Sheriff's Office, Federal Bureau of Investigation and Florida Department

of Criminal Law Enforcement. Several members of the task force knocked on Petitioner's door and then entered his residence with their weapons drawn. Petitioner was handcuffed, dressed by police, given medication for his heart condition and removed from his residence to the local offices of the F.B.I. Statements were subsequently elicited from Petitioner at the F.B.I. offices as well as Tampa General Hospital where Petitioner was taken after he suffered a minor heart attack while undergoing questioning.

Petitioner's statements were admitted into evidence at trial, over objection. The trial court had previously denied a pre-trial motion to suppress those statements.

Although the law was unsettled at that time, it is now clearly established that such actions by law enforcement officers are an unconstitutional infringement upon the Petitioner's Fourth and Fourteenth Amendment rights against unreasonable searches and seizures. Payton v. New York, 445 U.S. 373 (1980).

Payton, supra., holds that the Fourth Amendment made applicable to the States by The Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643; Wolf v. Colorado, 338 U.S. 25, prohibits the police from making a warrantless and non-consensual entry into a suspect's home in order to make a routine felony arrest.

No cause was shown in Petitioner's case as to why an arrest warrant was not or could not have been timely secured. Although the Supreme Court's opinion in Payton was announced after trial of this cause, the law set forth therein should be given retroactive application. It is law founded upon an interpretation of the Fourth Amendment and is a holding of fundamental and constitutional significance.

28. IN REVIEWING PETITIONER'S CONVICTION THE FLORIDA SUPREME COURT ACTING EX PARTE CONSIDERED MATERIAL OUTSIDE THE RECORD

While his appeal was pending before it, the Supreme Court of Florida requested and received, then purged from the file, reports concerning Petitioner, which were were not a part

of the trial court record or record on appeal, all without notice to Petitioner or his counsel of record. Petitioner's rights to due process of law, to the effective assistance of counsel on appeal, to confront the witnesses against him, to reliability and regularity in the imposition of the death sentence, to refrain from incriminating himself, and to the assistance of counsel in determining whether to exercise his right against self-incrimination were thereby denied in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

(a) The Supreme Court of Florida, since at least as early as 1975, engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and was not a part of the trial record or record on appeal. The information includes, but is not limited to: presentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluation or contact notes; psychological screening reports; recitations of a capital defendant's refusal to submit to a psychological examination from which a report could be prepared; post-sentence investigation reports and state prison classification and admission summaries. Except as to some of the presentence investigations pertaining to the offense on appeal the above information was requested and received without notice to capital appellants or their counsel of record.

(b) The Supreme Court of Florida purged its files of the secret information and did not accurately docket or otherwise record the request, the receipt, or the purge of the information.

(c) In light of this practice, Petitioner and 122 other death row inmates filed an original action in the Supreme Court of Florida. The Court denied the requested relief, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied _____ U.S. _____, 30 Cr. L. 4066 (11/2/81).

(d) Petitioner's appeal was pending before the Supreme Court of Florida during the time the practice of the Court described above was on-going.

(e) On information and belief, the Supreme Court of Florida received reports concerning Antone while his appeal was pending, without notice to counsel, pursuant to this pattern and practice. However, even if there was no receipt of specific information in Antone's case, his rights to reliability and regularity in the imposition of sentence, to the effective assistance of counsel and to proportional appellate review were violated.

29. FAILURE OF THE STATE TO PROVIDE IDENTITY AND EXISTENCE OF EXCULPATORY WITNESS

Petitioner's Judgment and Sentence of Death were obtained in violation of his rights to Due Process of Law under the Sixth and Fourteenth Amendments to the Constitution of the United States in that a material exculpatory witness, known to the State of Florida, was not disclosed to Petitioner's counsel although timely request was made for such information.

(a) The prosecution's chief witness and source of evidence at trial was Ellis Marlow Haskew, a co-defendant. At the time of trial, the prosecution knew of the existence of a witness who had testimony which was exclupatory for the Petitioner and in particular would have impeached and contradicted the testimony of Haskew. The prosecution did not reveal the name of this witness to Petitioner's attorneys although a demand had been made for the names of all witnesses who had information pertaining to the case whether such information was inculpatory or exclupatory pursuant to Rule 3.220, Florida Rules of Criminal Procedure.

(b) In failing to provide the name of this exculpatory witness, the State violated not only the State procedural rules but also the due process clause of the United States Constitution and the dictates of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.

(c) Petitioner's trial counsel obtained a sworn

statement from Robert Bruns, the undisclosed witness, on January 14, 1982, in which Bruns stated, under oath, among other things:

1. He had assisted the F.B.I. and Florida Department of Criminal Law Enforcement in the apprehension of Benjamin Gilford, a co-defendant in Petitioner's case.

2. He agreed to assist the F.B.I. and others in obtaining a tape recorded conversation of Benjamin Gilford.

3. For a number of days in February, 1976, he wore a body bug and had numerous conversations with Gilford which were tape recorded by the F.B.I.

4. In those conversations, Gilford stated that he, Gilford, had killed Det. Richard Cloud.

5. Gilford told him (Bruns) that Petitioner Antone did not know anything about Cloud's murder until after it occurred.

6. Gilford told him that the mastermind of the plot to kill Cloud was one Victor Acosta.

7. Gilford stated the Petitioner's only involvement was that he was paid money after Cloud was killed but received the money reluctantly because when he discovered what the money was for he became frightened.

8. He (Bruns) saw the recording device actually used by the F.B.I. to record the conversations with Gilford.

9. He (Bruns) met with the prosecuting attorney and discussed his conversations with Gilford in preparation for Gilford's trial.

10. He was never contacted by the prosecution regarding Petitioner's trial.

11. During Petitioner's trial, he was residing in the State of North Carolina.

12. He (Bruns) was told by the prosecution to get out of the State of Florida.

The above statements made by co-defendant Gilford and the tape recordings thereof would have been admissible in Petitioner's trial as statements made against penal interest a recognized exception to the hearsay rule had their existence

been made known to the Petitioner's counsel.

30. PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL

Numerous rulings by the trial court effectively precluded Petitioner from receiving a fair trial.

(a) The denial of the Petitioner's Motion to Suppress unlawfully obtained statements which were the product of an unlawful, warrantless arrest in Petitioner's home: Payton v. New York, 445 U.S. 373 (1980).

(b) The denial of Petitioner's Motion to Disclose the Identity of a Confidential Informant. Pointer v. Texas, 380 U.S. 400.

(c) The repeated admission into evidence of testimony relating to other criminal acts of the Petitioner unrelated to the charge of murder for which Petitioner was on trial. (R1463-1464) (R1466-1467) (R1480-1481) (R1484-1485) (R1507) (R1371).

(d) The trial court erred by allowing, over objections by defense counsel, testimony from Marlow Haskew concerning a conversation he had with Buck Gilford, the trigger-man in this homicide, subsequent to the murder of Richard Cloud. Such testimony resulted in an obvious denial of the Petitioner's Sixth Amendment Rights of confrontation as Gilford was not a witness in the trial and could not be compelled to testify. The testimony did not come within any recognized exception to the hearsay rule and specifically it was clearly not within the co-conspirator exception as the statement was not made during the course of the conspiracy, and clearly it was not in the furtherance thereof. Its prejudicial effect cannot be questioned for during the conversation Gilford told Haskew that the killing of this human being was no different than "shooting a dog".

(e) The trial court improperly permitted the prosecutor to cross-examine defense witnesses, Larry Miller, and George Mims far beyond the scope of the direct examination and by means of impeachment not recognized as permissible under

the law. These witnesses were called by the Petitioner, both to impeach State witness Richard Jantos and to aid in developing their theory. The trial court allowed this aspect of the Petitioner's case to be emasculated by permitting the prosecutor to inquire reqarding specific prior bad acts, thereby causing the witnesses to assert their Fifth Amendment privilege against self-incrimination in the presence of the jury. (R1676, lines 3-10) (R1680, lines 12-17), (R1682, lines 5-21), (R1685, 1686).

(f) With regards to the sentencing phase of the trial, the Petitioner was denied a fair trial in several respects. First, the court wrongfully dismissed for cause, at the request of the prosecution, each and every juror who expressed a conscientious or religious objection to the death penalty. As indicated above, this systematic removal of those veniremen with death penalty scruples was substantial and fundamental denial of defendant's Sixth, Eighth, Fourteenth, Amendment rights. Secondly, the Petitioner was denied a fair trial during the penalty phase by the court permitting the State to argue for the death penalty by stating that the only mitigating factors were those contained in the statute. Clearly, that was not at the time nor is it today the law. The prejudice to the Petitioner is substantial in light of the third fact which is that the court in charging the jury during the penalty phase, informed them of nothing to the contrary. The jury was left with the incorrect impression that the determination of the recommendation of death is nothing more than a counting process of X numbers of aggravating factors and Y numbers of mitigating factors: Clearly, it is not. State of Florida v. Dixon, 283 So.2d 1 (Fla. 1973); Lockett v. Ohio, 989 S.Ct. 2954 (1978).

31. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT AT BOTH TRIAL AND APPEAL -- INEFFECTIVE ASSISTANCE OF COUNSEL

The Petitioner was denied reasonably effective assistance by trial counsel in that:

(a) Trial counsel failed to file a motion with

the court requesting a change of venue allowed under Rule 3.240, Florida Rules of Criminal Procedure.

(b) Trial counsel failed to request that the jury panel be sequestered during voir dire, and that the veniremen be questioned individually regarding their knowledge of the case.

(c) Trial counsel made an insufficient inquiry during voir dire into the knowledge of each veniremen regarding the defendant.

(d) Trial counsel made an insufficient inquiry during voir dire into the knowledge of each veniremen of pre-trial publicity concerning the Petitioner, and its effect on each prospective juror.

The murder of Richard Cloud was a highly sensational and publicized case. The homicide had several spectacular aspects which the media exploited to the utmost. The victim was an undercover narcotics officer on suspension from the force; the murder had indications of being a mob-type execution. There was extensive media coverage of the homicide as well as the investigation. A joint task force of city, state and Federal law enforcement officers was formed to find the murderers. Every development in the case was publicized. When the Petitioner was arrested, considerable publicity resulted. The publicity and media coverage continued up to the day of the trial and thereafter during the trial, and still continues to this day.

The failure of trial counsel to move for a change of venue was a serious mistake. During voir dire, it became apparent that approximately half of the jurors had read or heard about the case in the media. At that point, it became incumbent on trial counsel to inquire of the jury the effect of that pre-trial publicity. The record bears out that the inquiry which was made was insufficient, limited to such questions as "how many articles have you read?" There was no searching or probing of the jurors to find out just exactly what predisposition or bias they might be bringing into the trial.

Perhaps out of fear that such questions might lead to answers which could poison the other jurors, the questions were limited. A reasonable alternative would have been to request sequestration and individual voir dire examination.

Without either moving the trial to another jurisdiction which had not been inundated with publicity or seriously inquiring into the effects of that publicity on the minds of the veniremen, trial counsel could in no way assure that the Petitioner's Sixth Amendment Right to a trial by an impartial jury was being met.

There should be little argument that the jury panel selected did not give intensive consideration to the four days of testimony and fifty plus items of tangible evidence. Even less consideration was given to the penalty phase. Clerk minutes as well as the Record on Appeal show that the jury spent less than two hours on the guilt phase and only 24 minutes on the penalty phase.

(e) It is apparent from the record that trial counsel did not understand the significance or importance of Witherspoon v. Illinois, supra, in that:

i) Petitioner's trial counsel did not ask a single question during voir dire regarding the veniremen's beliefs or opinions as to capital punishment.

ii) Petitioner's trial counsel did not voice a single objection to questions propounded by the prosecutor regarding capital punishment.

iii) Petitioner's trial counsel did not voice a single objection to the Court's dismissing for cause, five of the six veniremen who expressed death penalty scruples, without full inquiry.

iv) Petitioner's trial counsel made no request or effort to voir dire these six veniremen to determine whether or not, inspite of their death penalty scruples, the veniremen could still abide by the law and provide Petitioner with a fair trial.

At a bare minimum counsel in a death penalty case must during voir dire, explore the prospective jurors opinions regarding capital punishment. In capital cases, as in no other criminal case, it is imperative that the veniremen express their opinions on the death penalty. If trial counsel is going to insure that his client is tried before a fair and impartial jury which fairly and truly is representative of the community inquiry absolutely must be made.

The failure to make inquiry coupled with the prosecution's systematic and complete exclusion of those veniremen with death penalty scruples left the Petitioner with a jury panel which was in favor of capital punishment and without any death penalty scruples at all. As a result, a legitimate class of persons was excluded from this jury panel. The jury as composed was not a "body truly representative of the community" Smith v. Texas, 311 U.S. 128 (1940). The failure of trial counsel, amounted to a substantial denial of Petitioner's Sixth, Eighth, and Fourteenth Amendment Rights under the United States Constitution. One only has to look into the record to see that this jury panel spent less than 30 minutes to decide the issue of life or death.

(f) The trial counsel failed to render effective assistance during the pre-trial motions, and during the trial by failing to object to the introduction of Petitioner's statement, on the grounds that the statement was the result of an illegal arrest in violation of Petitioner's Fourth Amendment rights. Payton v. New York, 445 U.S. 373 (1980). The Payton court ruled that such an illegal arrest without a warrant was such a substantial infringement of the Fourth Amendment rights that the judgments and sentences had to be reversed.

(g) The trial counsel did not effectively investigate the case, in that they failed to discover an essential witness to the defense.

In the trial counsel's own Motion to Vacate, he states that he has recently discovered the existence of a witness, Robert Bruns, and the existence of tangible evidence. Should

the Court ruled at hearing on that motion that such information was in fact disclosed to the Petitioner, through discovery or that such information was readily discoverable through appropriate discovery means, then Petitioner was denied an important and essential witness for his defense. Such witness would have provided both direct evidence and substantial corroboration to the Petitioner's case and further would have provided an effective means of impeaching the State's chief witness Marlow Haskew.

(h) Trial counsel's failure to cite to the court appropriate law limiting areas of impeachment of Petitioner's witnesses resulted in an emasculation of the defense case presented by witnesses, Larry Miller and George Mims. Although this portion of the testimony was limited in scope it was at the center of the defense theory argued to the jury that Richard Jantos was involved in the homicide rather than the Petitioner. The failure of the counsel to cite accepted and established law limiting areas of impeachment completely destroyed the effectiveness of that portion of Petitioner's case.

(i) The penalty portion of the trial clearly shows a lack of understanding on the part of the trial counsel, of the law on capital punishment. This denial of effective assistance of counsel during penalty phase infected the reliability of the penalty determination and resulted in the arbitrary and capricious imposition of a death sentence.

The basic lack of comprehension of the law pertaining to capital punishment resulted in:

1) A failure by the Petitioner's counsel to present other mitigating circumstances outside the statutorily prescribed factor.

2) A failure by the Petitioner's counsel to counter the prosecutor's presentation during the penalty phase that indicated that the process of deciding the recommendation of death was one of counting aggravating and mitigating factors.

3) A failure of Petitioner's counsel to clarify the statement by the prosecutor at (R1896) "These are the only

mitigating factors under the statute. This defendant does not qualify for one mitigating factor, not one. He qualifies under four of the statutory aggravating factors". Clearly under Dixon v. State, 283 So.2d 1 (Fla. 1973) published three years earlier, that was a misstatement of the law.

4) The failure of trial counsel to argue mitigating factors outside of the statute lent consideraable credence to the State's presentation indicating that the penalty phase was merely a counting process. Clearly trial counsel could have argued as a separate mitigating factor the unequal punishment for the same crime that existed between Marlow Haskew and the Petitioner. Clearly, trial counsel could have presented evidence and argued diminished capacity based on the brain surgery Petitioner previously undetwent, as a separate mitigating factor. Clearly, defense counsel could have presented some testimony of Petitioner's character which would attempt to counter the picture painted by the prosecution.

5) The failure of defense counsel to request spacial jury instructions on the penalty phase which instructions would have cleared up the deficiencies in the standard instructions employed by the Court. For instance, under these instructions, the jury is told that "it is your duty to follow the law which will now be given to you by the Court". (R1914) The jury is then told the aggravating factors followed by these instructions on mitigating circumstances: "The mitigating circumstances which you may consider, if established by the evidence are these...". Seven mitigating factors are read -- no where is the jury told that they are not limited to those seven factors and trial counsel did nothing to enlighten the jury of that fact.

The total lack of understanding and lack of presentation by trial counsel during the penalty phase denied Petitioner his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. When this portion of the trial is coupled with the ineffective assistance rendered to Petitioner during voir dire, such a serious deficiency exists that

the Court cannot conclude that the ultimate outcome of the trial was not affected. With a jury intentionally composed by the prosecutor to exclude all persons with death penalty scruples and a woefully inadequate presentation during the penalty phase, it is no wonder that the recommendation of death took less than 30 minutes.

(j) Petitioner was represented on mandatory appeal by one of his trial attorneys. Petitioner was denied effective assistance of appellate counsel in that counsel did not include the following meritorious legal claims:

1) That the jury selection in this cause was contrary to the limitations and dictates of Witherspoon v. Illinois, supra, for the reasons set out above.

2) That the arrest of the Petitioner was in violation of his constitutional rights and required that the judgment and sentence be set aside.

3) That the Petitioner was denied a fair trial within the meaning of the Sixth Amendment based on the totality of rulings made during his trial and set out in point four above.

4) That the Petitioner was denied effective assistance of counsel in the trial stage.

5) That the penalty phase of the trial violated Petitioner's constitutional rights in that the trial court allowed the jury to consider only those mitigating factors set out in Florida Statute 921.141.

6) That the penalty phase of the trial violated Petitioner's constitutional rights in that the trial court instructed the jury using instructions which do not contain a complete and accurate statement of the law of capital punishment.

32. THE JUDGMENTS AND SENTENCES OF DEATH ARE CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The judgment and sentence of death in this case is contrary to the Eighth and Fourteenth Amendments in that:

(a) The trial court limited jury consideration of

mitigating factors to those statutory factors contained in Florida Statute Chapter 921.141(6) in violation of the United States Constitution.

(b) The imposition of the death penalty constitutes cruel and unusual punishment as applied to this Petitioner under the facts and circumstances of this case.

(c) The construction and application to this Petitioner of the aggravating factors, "especially heinous, atrocious, and cruel" by the Florida Supreme Court is so broad as to make its application violative of the Eighth and Fourteenth Amendments.

(d) The prosecutor was guilty of misconduct by arguing nonstatutory aggravating factors.

The trial court improperly limited jury consideration of mitigating factors to those contained in the Jury Instructions and Chapter 921.141(f), Florida Statute 1975.

In instructing the jury, the court stated:

> "The mitigating circumstances which you may consider, if established by the evidence, are these:
> A. That the defendant has no significant history of prior criminal activity;
> B. That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance;
> C. That the victim was a participant in the defendant's conduct or consented to the act;
> D. That the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor;
> E. That the defendant acted under extreme duress or under the substantial domination of another person;
> F. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
> G. The age of the defendant at the time of the crime." (R1917, 1918)

The jury was never informed that they could and should consider any other aspect of the Petitioner's character or any other circumstance of the offense that was relevant.

In arguing to the jury during penalty phase, the prosecutor argued that the mitigating factors contained in the statute were the only factors and that Petitioner did not

qualify for any of them. As stated earlier, the Petitioner's trial counsel did nothing to correct this interpretation of the statute. Further, the trial Court's order in support of the death penalty limited consideration to only statutory aggravating and mitigating factors. Nevertheless, the limitation by the trial court to consideration of only statutory mitigating circumstances is contrary to the Eighth and Fourteenth Amendments. Subsequent to the trial of this cause, the United States Supreme Court in its decision in Lockett v. Ohio, 438 U.S. 586 (1978) held that the failure to allow relevant non-statutory mitigating circumstances in the sentencing phase of a capital case violates the Eighth and Fourteenth Amendments. See Songer v. State, 365 So.2d 696 (Fla. 1978). It is clear that there were other non-statutory mitigating factors which could be argued as separate, distinct, mitigating factors. The disparity in punishment between Haskew and the Petitioner could have been set out and argued as a distinct, separate non-statutory mitigating factor; other positive character traits could have been set out as a distinct non-statutory mitigating factor.

It is submitted that the limitation of mitigating factors in any fashion is fundamental error and cannot be countenanced by the Eighth and Fourteenth Amendments of the United States Constitution. It is further submitted that the violation is so fundamental that the failure by trial counsel to object does not constitute a waiver.

The imposition of the death penalty constitutes cruel and unusual punishment as applied to this Petitioner under the facts and circumstances of this case.

The Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976) held that the death penalty does not constitute cruel and unusual punishment per se, and that the Florida Capital Penalty statute is constitutionally valid on its face. Conceding, for arguments sake, that the rule in Proffitt is correct, the Petitioner contends that the imposition and carrying out of the death penalty constitutes cruel and unusual punishment under the circumstances of this case. Proffitt does not foreclose

the argument that the death penalty may be unconstitutional as applied to a given case.

The basis of the argument is that the totality of the circumstances require a finding that the death penalty was not appropriate. The incredible disparity existing between the punishment given Ellis Marlow Haskew and the Petitioner cannot be accepted under any principle of constitutional law. An honest unbiased reading of the record shows that in almost every point relied upon by the court to support the sentence of death, the same point would be applicable to Haskew. He too had a serious felony background and he too was involved for pecuniary gain. In fact, the record shows that Haskew received a total of $7,000-$8,000 from the Petitioner. Just as the Petitioner "recruited" Haskew, Haskew recruited the triggerman; just as the Petitioner had passed the money along to Haskew, Haskew passed it along to the triggerman; just as Antone gave the gun to Haskew, Haskew gave the gun to the triggerman; just as the Petitioner was aware that the murder was done to disrupt and hinder the enforcement of the laws so, too, did Haskew. Haskew was not a pawn of Petitioner's, and his participation is no less significant in the actual killing.

The disparity that exists between a sentence of 35 years with eligibility of parole at any time, and a sentence of death cannot be justified without some far greater disparity of actual culpability.

The construction of the aggravating factor "... especially, heinous, atrocious, and cruel" by the Florida Supreme Court is so broad as to make its application violative of the Eighth and Fourteenth Amendments.

The United States Supreme Court upheld the term "especially heinous, atrocious, and cruel" contained in §921.141 (5)(h), Florida Statute 1975 in Proffitt v. Florida, 428 U.S. 242 (1976) against a challenge of vagueness and overbreadth, but only because the then existing decisions of the Florida Supreme Court cured whatever constitutional defects that may have

existed in the term by construction. id at 254. The Petitioner submits that the construction placed upon the term by the Florida Courts in all of the death penalty cases decided in the years since Proffitt, has rendered the meaning of the term vague and overbroad.

The Florida Supreme Court rulings in Proffitt v. State, 315 So2d 461 (Fla. 1975); Swan v. State, 322 So2d 485 (Fla. 1975); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Gibson v. State, 351 So.2d 948 (Fla. 1977); Cooper v. State, 336 So.2d 1133 (Fla. 1976); Kampff v. State, 374 So.2d 954 (Fla. 1979), indicate that there is no definite pattern to the manner in which this factor has been used. Judicial interpretation has not succeeded in solidifying the definition of the term "especially heinous, atrocious, and cruel". It is submitted that the phrase has been rendered vague and overbroad by judicial construction. Since this factor supports the imposition of the death penalty in this case, the judgment and sentence must be vacated.

Further, the prosecutor was guilty of misconduct by arguing non-statutory aggravating factors. The import of the prosecutor's argument during penalty phase is that this murder was not an accident, it was not a rage type killing, but in fact, was a cold, calculated, highly premeditated "murder for hire" (R1898). The fact of premeditation, and the fact that the murder was cold and calculated are not properly arguable as aggravating factors. To set them up as such is to go outside the statutorily defined aggravating circumstances and is therefore contrary to the Eighth and Fourteenth Amendments.

33. PETITIONER WAS DENIED A FULL AND FAIR HEARING OF THE ISSUES RAISED IN HIS MOTION TO VACATE SENTENCE

On January 21, 1982, a hearing was held on Petitioner's Motion to Vacate Sentence in the trial court. Petitioner's counsel requested the trial court to enter a stay of execution and to continue the hearing on that motion in order that the issues set forth therein could be properly raised. Both motions were denied.

At the same hearing, Petitioner's counsel moved for the appointment of expert witnesses for the purpose of developing Petitioner's claim of ineffective assistance of counsel and for the purpose of developing the issue regarding the jury selection process employed by the prosecutor and defense counsel and its effect on the penalty phase. The trial court denied that motion also, reasoning that the court could pass upon that question of fact without considering expert opinion.

In denying Petitioner's Motion to Vacate Sentence, the trial court found that it was not able to pass upon some of the issues raised therein because the court lacked jurisdiction over some issues and that other issues were proper issues to be raised on direct appeal rather than through collateral attack, lending credibility to the Petitioner's claim of ineffective assistance of counsel on appeal, supra.

In a death penalty case, as in no other, the courts should afford a death-sentenced individual every opportunity to fully raise and develop issues which may result in the ultimate penalty being set aside. Petitioner raised several meritorious claims which he was not afforded an adequate opportunity to develop through witnesses of his choosing who were simply unavailable due to the fact that the hearing on Petitioner's Motion was so hastily scheduled. Obviously, the trial court was attempting to accommodate Petitioner by setting the hearings as soon as possible in order to allow appellate review of its order in a timely fashion before the Death Warrant either expired or caused Petitioner's expiration. However, expediency is no excuse where meritorious issues exist which need to be fairly considered.

Additionally, the simple remedy of granting a stay to allow time for a full and fair hearing would not prejudice the State since Petitioner would remain imprisoned under sentence of death during the pendency of the hearing.

V. OTHER REQUIRED INFORMATION

34. All of the foregoing grounds have been previously

raised in the Florida State Courts, either on direct appeal, in original habeas corpus proceedings in the Supreme Court of Florida, or in the Motions for Post-Conviction Relief or Motion to Vacate Sentence.

35. Petitioner currently has no petition, application, appeal, motion, or any other pleading now pending in any court, state or federal concerning the judgment herein, except his appeal from the denial of post-conviction relief now pending in the Supreme Court of Florida.

36. The names and addresses of the attorneys who have represented Petitioner in the past, and who represent the Petitioner currently are as follows:

A. At Arraignment, Trial, Sentencing and Appeal:

1. Angelo M. Ferlita
Diecidue, Ferlita, Prieto and Nutter, P.A.
612 Horatio Street
Tampa, Florida 33606
(813) 251-0124

2. Jim Alphonso, Attorney at Law
2300 Kennedy Boulevard
Tampa, Florida

B. On Petition for Writ of Certiorari to the United States Supreme Court:

1. Angelo Ferlita
Address same as above

C. On Motion for Post Conviction Relief:

1. Angelo Ferlita and Robert H. Nutter
Address same as above

2. Thomas B. McCoun, III
Louderback & McCoun
1 Plaza Place N.E., Suite 1009
St. Petersburg, Florida 33701
(813) 896-2147

D. On Motion to Vacate Sentence, other Post-Conviction Relief and in Federal Habeas Corpus Proceedings, Petitioner is represented by the undersigned counsel.

37. Petitioner was sentenced under the one and only count of the Indictment against him.

38. Petitioner has no further sentence to serve after completing the sentence imposed by the Judgment under attack.

VI. PRAYER FOR RELIEF

WHEREFORE, Petitioner, ATHONY ANTONE, prays:

1. The Court will forthwith issue an Order staying his execution pending final disposition of this matter and further order of this Court.

2. That a Writ of Habeas Corpus be directed to Respondents.

3. That the State of Florida be required to appear and answer the allegations contained in this Petition.

4. That Petitioner be afforded an evidentiary hearing on the allegations contained in this Petition and that he be present at that hearing.

5. That, after a full hearing, Petitioner be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death.

6. That Petitioner, who is indigent, be granted sufficient funds to secure expert testimony and other testimony necessary to prove the facts as alleged in this Petition.

7. That Petitioner be granted the authority to proceed in forma pauperis, including the right to obtain subpoenaes in forma pauperis, for witnesses and documents necessary to prove the facts alleged in this Petition.

8. That Petitioner be allowed a period of sixty days, which period shall commence after the completion of any hearing this court determines to conduct, in which to brief the issues of law raised by this Petition.

9. That Petitioner be allowed to amend this Petition up to and including the commencement of the hearing requested herein.

10. The Petitioner be allowed other, further and alternative relief as may seem just, equitable and proper under the circumstances.

I HEREBY CERTIFY that a copy of the foregoing has been furnished by HAND, to Charles Corces, Assistant Attorney General, Park Trammel Building, 8th Floor, 1313 Tampa Street, Tampa, Florida 33602, this 22nd day of January, 1982.

THOMAS B. McCOUN, III, ESQUIRE
LOUDERBACK & McCOUN
1 Plaza Place N.E., Suite 1009

FRANK LOUDERBACK, ESQUIRE
LOUDERBACK & McCOUN
1 Plaza Place N.E., Suite 1009

Best Copy Available

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANTHONY ANTONE, Petitioner,	)	
vs.	)	CASE NO.: 82-61-Civ-T-GC
CLAYTON STRICKLAND, et al., Respondents.	)	

TRANSCRIPT OF PROCEEDINGS

BEFORE: Honorable Georege C. Carr, Judge, United States District Court, Middle District of Florida.

Counsel for Petitioner:

MR. TOM McCOUN
MR. FRANK LAUDERBACK
Louderback & McCoun
Attorneys at Law
The Plaza Office Tower
1 Plaza Place N.E.
Suite 1009
St. Petersburg, Florida 33701

Counsel for Respondents:

MR. CHARLES CORCES, JR.
MR. ROBERT LANDRY
Assistant Attorneys General
1313 Tampa Street
8th Floor
Tampa, Florida 33601

Reported by:
Rosie Sclafani, RPR, CM

January 29, 1982

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANTHONY ANTONE, Petitioner,	)	
vs.	)	CASE NO.: 82-61-Civ-T-GC
CLAYTON STRICKLAND, et al., Respondents.	)	

TRANSCRIPT OF PROCEEDINGS

The above proceedings were called to order before the Honorable George C. Carr, Judge, United States District Court, in the Courtroom, second floor, Federal Building, Tampa, Florida, commencing on January 29, 1982, at 11:00 a.m.

The Petitioner was represented by Messrs. Tom McCoun and Frank Lauderback, of Lauderback & McCoun, Attorneys at Law, The Plaza Office Tower, 1 Plaza N.E., Suite 1009, St. Petersburg, Florida 33701.

The Respondents were represented by Messrs. Robert Landry and Charles Corces, Jr., Assistant Attorneys General, 1313 Tampa Street, 8th Floor, Tampa, Florida 33601.

Thereupon, the following proceedings

were had and taken:

THE COURT: Good morning, gentlemen. For the record, this is the case of Anthony Antone, Petitioner, versus Clayton Strickland, Louie Wainwright and Jim Smith, Respondents. Case Number 82-61-Civ-T-GC.

First, let me say that it may be obvious that the Court has given this case expedited attention. It may or may not be obvious that the Court has also given intense mental and physical attention to this case. And I have finally concluded this morning that I'm probably as well prepared to give some sort of reasonable judgment about this case as I'll ever be. So I intend to now rule on the case from the Bench, giving my reasons therefore, and if I ramble somewhat, please excuse me, because part of this is from notes, part of it is not from notes. I will attempt to set forth the issues as best I can alleged by the petition and answer them and rule on them as best I can.

First of all, there was the jury selection or Witherspoon issue raised by the petition. The Court has reviewed the

transcripts of the voir dire of the six veniremen that the petitioner contends were improperly excluded from the jury. The Court is satisfied that the questions asked and the answers given fully comport with Witherspoon versus Illinois. I'm not going to give cites on some of these cases because they are well known cases that counsel are familiar with and, if need be, if this record is transcribed, I might ask my court reporter to give the cites, which she can get from me at a later time.

As a side note to this issue, I understand that the petitioner wanted an evidentiary hearing to show that there was a systematic exclusion of jurors. It's just interesting to note and, as I say, this is just merely a side note, that one of the jurors that was excluded by peremptory challenge, after giving some questions concerning his ability to act in this case as a juror, although not sufficient to be a matter of cause, that's Mr. Delgado, that a further review of the record on voir dire indicated that Mr. Delgado revealed that he lived three blocks from Mr. Antone for over -- well, he had lived in a

house which was three blocks from Mr. Antone for over thirty years; that he periodically saw Mr. Antone and knew him but he didn't know him personally; so certainly that alone could have been sufficient reason for a peremptory challenge.

Now, the next issue -- anyway, the Court feels that the first issue fails.

The next issue is an allegation that there was an admission of statements illegally, and maybe other evidence, illegally obtained from the Petitioner because of a violation of the Payton issue. The Payton issue being the arrest of a defendant in his home without a warrant, simply put. The Court thinks that this issue also fails for two reasons: first, that it is foreclosed from collaterally reviewing this Payton issue because the State has provided a statutory mechanism for the consideration of such a claim, this claim being a Fourth Amendment claim, and I think Stone V. Powell is supportive of that. In addition, the Court has not found any binding authority that the Payton ruling is retroactive, and the Court is of the opinion that it should be analyzed

much as the Miranda decision has been analyzed in other cases, and it should not be applied retroactive. So that fails.

The third issue is that in reviewing the Petitioner's conviction, the Florida Supreme Court acted ex parte considering material outside the record. This Court has previously addressed and rejected this issue in the case of Witt V. Wainwright, which is a case out of the Middle District of Florida, and it's not a published case but the Case Number -- it's in the Tampa Division -- is 80-545-Civ-T-GC. And the fact as was indicated by Mr. McCoun yesterday, that there may be evidence that specific material pertaining to this petitioner was furnished the Florida Supreme Court doesn't change the rationale of the Court in the Witt decision and, therefore, this issue fails.

The next issue is an allegation that there was a failure of the State to provide identity and existence of an exculpatory witness. This particular issue was considered in an evidentiary hearing by State Circuit Judge Merkle on a Rule 3.850 motion. Title 28, United States Code, Section 2254(D) provides

that the findings of that Court as to the factual matters therein should be presumed to be correct unless one or more of the circumstances set out in paragraphs 1 through 7 of Section 2254(D) are deemed to exist or the State Court record does not fairly support the Court's factual determination. I do not believe paragraphs 1 to 7 apply. And after reading the transcript, I find that the record fairly supports Judge Merkle's decision that no Brady violation occurred with respect to Mr. Brooms. Cite Sumner V. Mata in support of that. So that issue fails.

The next issue is that Petitioner was denied his right to a fair trial. In other words, there were a great number of errors by the trial judge. As I understand the Petitioner's contention, not one of these errors by itself would necessarily rise to the level of a due process violation and therefore deny a right to a fair trial, but it's the cumulative total of these alleged many errors that would give rise to a constitutional deprivation. So the Court feels compelled to address each of these alleged errors, and after

addressing each of them, look at them in the total to determine if, assuming that there were some errors, that they, by accumulating them, they could rise to a constitutional deprivation which this Court would need to address.

First of all, there was alleged that there was a denial of a Motion to Suppress statements obtained in violation of Payton. I've already noted earlier that that consideration of this is precluded by Stone V. Powell. In addition to that, I might comment that the Payton issue or the Payton case was, of course, only decided after this trial and at the time of this trial, it was not likely that any Court would, any State of Florida Court, would have suppressed these statements on this ground because the law seemed to be contrary to the State of Florida.

The second alleged error is the denial of the Motion to Disclose Confidential Informant. And I now understand that we're not talking about Mr. Brooms. To the extent that the ground asserted is the one raised on direct appeal, the facts do not appear in dispute. Based upon these facts, it's hard to identify

how the Petitioner's constitutional rights were abridged. As the Florida Supreme Court noted, it does not appear that the Petitioner was even prejudiced by the non-disclosure. That's in the Antone case, 382 So. 2d, 1205 at page 1214.

Now, the Petitioner asserts that the information this confidential informant had would rebut the conclusion that the Petitioner was the mastermind of this affair and it would be probative at sentencing. The Court notes that the trial Judge was fully aware of this information during the trial. He was privy to the depositions. He knew exactly what this information was that the confidential informant had given, and yet at the sentencing phase of this trial he made findings of fact in which he found that the Petitioner was the mastermind of this affair. So the Court can't find any prejudice accruing to the Petitioner by way of the failure to disclose this at the trial.

Now, the next error alleged is the repeated admission into evidence of testimony relating to other criminal acts. And in reviewing an allegedly erroneous evidentiary ruling, a Federal habias Court is required to

determine not only that an error occurred, but also that the error denied fundamental fairness to the Petitioner. In support of that is the case of Hills V. Henderson, 529 Fed. 2d 397. That a Fifth Circuit case. The trial Court's admission of evidence concerning the Petitioner's other criminal activities was, in this Court's opinion, relevant to the issues before the jury and its admission does not appear to be error, let alone error of constitutional magnitude.

The next issue raised or error alleged is the trial Court erred in allowing in testimony from Marlow Haskew concerning the conversation he had with Mr. Gilford. This was not raised on appeal and there appears to be some question as to whether it is exhausted. And it appears to this Court that the Petitioner has waived his rights since he has had ample opportunity to present this to the State Courts on earlier occasion. In any event, this issue does not rise to the level of constitutional dimensions.

The next issue is that the trial Court erred in letting the prosecutor

cross-examine Mr. Miller and Mr. Mims beyond permissible boundaries. Now, the petition does not develop any factual basis for a finding that there was evidently an error or that it rose to the level of constitutional deprivation. Federal habias Courts do not review State evidentiary problems. In support of that is the case of Mercardo V. Massey, 536 Fed. 2d 107, again, a Fifth Circuit case. And like what the Court said about the repeated admission into evidence of testimony relating to other criminal acts, there is no indication that the error, if any, rendered the Petitioner's trial fundamentally unfair.

Next, there are allegation concerning problems or errors in the sentencing phase. First, there was the alleged Witherspoon issue error. The Court has already addressed itself to that and does not feel that there was an error. It's alleged that the Court allowed the State to say that only statutory factors applied in the sentencing phase, either, well, we're talking primarily of the mitigating statutory.

And thirdly, that the Court

improperly charged the jury concerning aggravating and mitigating factors. The Court is going to address that more fully in that portion of the decision where it addresses the violation of the Eighth and Fourteeth Amendment claims. Suffice it to say that they will be addressed.

Now, looking at all of these alleged errors now in the totality of the circumstances, the Court can determine from that that it may not have been a perfect trial but it certainly was a constitutional one, in the Court's opinion.

Now, the next allegation or issue, rather, is that the Petitioner was denied effective assistance of counsel at the trial and on appeal. There are certain -- I'll divide this first up as the effective assistance at trial and discuss that first and then effective assistance on appeal as the second one.

There are a number of things the Petitioner has set forth concerning the allegation that he was denied effective assistance of counsel at trial. I think I need

to comment on those when I can.

First of all, that counsel was ineffective because of the failure to request a change of venue. Now, Judge Merkle found in an evidentiary hearing that this does not constitute ineffective assistant because the decision not to change venue was a joint strategic decision made by counsel and the Petitioner. So under Sumner V. Mata and Section 2254(D), this Court must presume that Judge Merkle's factual determination was correct. So based on the facts as found by Judge Merkle, it's clear to the Court that this was no ineffective assistance.

Now, let me interject an added comment at this point considering a number of the other alleged ineffective acts, I guess, is one way to put it. The Court notes in reviewing this record that the Petitioner failed to carry his burden as to a number of these matters because, for one thing, his counsel refused to let the trial counsel, Mr. Ferlita, testify because of the lawyer/client privilege. Obviously, Mr. Ferlita would shed more light on these

issues than anyone else. And it is clear in making such ineffective of counsel claim necessarily waives this privilege. So as to a number of these alleged acts. There really is an absence of fact. Certainly, the Petitioner should not be allowed to have an evidentiary hearing and then fail to present evidence as to certain allegations and then turn around and come to this Court and ask for an evidentiary hearing on that matter when he had previously been offered that opportunity. So the second allegation that there was ineffective assistance, that is, the failure to ask for jury sequestration and to individually ask veniremen questions about their knowledge of the case, was not addressed at that evidentiary hearing, but the Court has personally reviewed the voir dire, at least the transcript of the voir dire, and finds that it is adequate. Again, in hindsight, there may have been some other questions, but the Court doesn't think that it rises to the level of ineffective assistance and will discuss a little further or a little later rather its understanding of the standards that it should apply.

Next was allegation that counsel made insufficient inquiry during vior dire concerning the veniremen's knowledge of the defendant. Again, there was an absence of facts in the hearing in the State Court, but the Court has reviewed that transcript and is satisfied with the attorneys performance. Certanly it's not ineffective assistance.

Next, counsel made insufficient inquiry concerning the effect of pretrial publicity on the veniremen. The same thing applies. The Court had to review that portion of the voir dire and, although it may not have been the way this Court would have conducted it or some other attorney may not have conducted it that way concerning the pretrial publicity, I think it did not rise to the level of ineffective assistance.

And the next question was, I think, or allegation was that counsel didn't ask the Whitherspoon question. The Court has already ruled on that. I've reviewed that and felt that it did or that counsel did. It may have been asked by the prosecutor, but it was asked, and there was no reason for the defendant's

counsel to continue to pursue that.

Now, the next allegation is that trial counsel failed to raise a Payton issue. I've discussed this already, but again, the Petitioner's arrest preceded the Payton decision by four years. At the time the trial, the law in Florida was, this Court believes, firmly established that arrests similar to those conducted in the instant case were legal; and I cite State V. Perez, 277 So. 2d 778. Significantly, counsel did move to suppress the statements on Fifth Amendment grounds, that is Miranda grounds, and also moved to suppress evidence obtained pursuant to a search warrant. Both these motions were denied and their denials appealed. So I don't think under those circumstances it would be indicated there was ineffective assistance.

The next was that the trial counsel did not effectively investigate in that they failed to discover essential witnesses to the defense. In sum, the Petitioner contends that his attorneys would have discovered Robert Brooms had they adequately investigated the case. It is not necessary to determine the

degree of preparation in the investigation conducted since the Court has already concluded, based on the facts found by Judge Merkle, that Brooms' testimony would in no way be exculpatory. No prejudice is shown.

The next allegation was a failure to cite law, re: impeachment, which allowed or thereby allowing Miller and Mims to be impermissably cross-examined. Again, there is an absence of facts concerning this. But in any event, the Court is not even sure it's an evidentiary error, and certainly not in itself is it ineffective assistance of counsel.

Now, I've had those things to say about the alleged ineffective assistance of counsel at trial.

There's one other, excuse me, one other allegation, and that is that counsel failed to provide adequate assistance in the penalty phase of this trial proceeding. And in that regard, Petitioner alleges that counsel didn't present non-statutory mitigating factors. Well, as I read the record, at least in counsel's mind, they did in that he presented this department of corrections report which it

certainly argued mitigating factors from that. So there was a presentation of some non-statutory mitigating factors. Then Petitioner alleges that there was a failure to show the jury that the prosecutor's comment on mitigating and aggravating factors were incorrect, the failure to clarify the prosecutor's statements, that he didn't argue the separate mitigating factors and didn't ask for jury instructions about non-statutory mitigating factors. Let me answer that later one first and comment that the instruction that was given was the Florida standard jury instructions concerning this and I think it would have been very difficult to persuade any judge, I'm sure, at that time to give any other instructions other than that, and the failure to request one, I would not think, would be ineffective assistance.

As to some of these other matters, the Court has -- again, this was not developed as well as one would have hoped at the evidentiary hearing because of the failures already pointed out, but a review of the record and the argument would, to this Court, or any

comments to that would, to this Court, be hindsight. That this defense counsel made fair arguments -- I may not have made them that way and some other attorney may not have made them that way. But certainly, they were, I thought, fair, good arguments and so this one failure didn't rise to the level of ineffective assistance in the Court's opinion.

Now, those are the matters that Petitioner has alleged showed ineffective assistance of counsel in the trial stage.

He's also alleged that there was ineffective assistance of counsel at the appellate stage. Now, we don't have any State Court findings of fact which would be helpful to this Court, but the Court is of the opinion that there is no need for an evidentiary hearing concerning this because it's all in the record. The Court has reviewed this record and the allegations as to this ineffective assistance at the appellate stage, I think, can be satisfactorily answered. First of all, Petitioner alleges that there was the failure to raise the Whitherspoon. Well, the Court has already addressed that and is firmly convinced

that there was no Whitherspoon problem, and I might at the onset indicate that the Court has read the appellant's brief. It consisted of 50 pages, and many many alleged errors were set forth therein. This Court has been involved with litigation long enough to know that the longer a trial or an appellant brief is, the more difficult it is to point out a concise and cogent way the things that you're really interested in and that you really want the Appellate Court to bore into and the things that you think are more significant. The failure to raise the Whitherspoon issue in light of that brief certainly is understandable, because it would have been one of the weakest issues, in this Court's opinion.

There was then an allegation that there was a failure to raise the Payton issue. I've already indicated that case had not even been decided at the time this was appealed and the state of the law in Florida at that time appeared to be contrary to the position that Payton expresses.

Thirdly, it's alleged that there was a failure to raise the evidentiary ruling

errors. Well, a review of appellant's brief indicates that many many alleged errors were raised, and the Court has commented on the alleged evidentiary ruling errors earlier and the failure to set those forth in light of the questions that this Court has about them certainly would not have risen to the level of ineffective assistance by failing to set them forth as an error.

The next is an allegation that there was a failure to raise effective assistance of counsel at trial. I commented on that yesterday and I tried to think about that and see if I was overlooking something, but I still think that's rather ludicrous because it would be rather ridiculous for Mr. Ferlita, who was the trial counsel, to, on appeal, allege that he was ineffective in his assistance to this petitioner at the trial. It just doesn't make sense to the Court, and it seems to be obvious.

Now, the next is -- well, let me combine the next two allegations. First that there was a failure to raise the fact that the trial Court allowed the jury to consider only statutory mitigating factors and that there was

a failure to raise instruction re the penalty phase.

What those two allegation refer to is a so-called Lockett problem. First of all, at the time of the appeal, the Lockett case had not even been decided. There were some -- I think it may be a little too much to expect of this counsel or any other counsel to be the one who may have been the innovator who was to point out the problems raised by Lockett in which the Supreme Court has set forth must be considered in sentencing when we have capital punishment involved, what should be considered. And the Court also questions whether the question of effective assistance of trial counsel could have been raised on direct appeal, thinks it might be that it would have to have been raised only on a Rule 3.850 motion.

Now, I would like at this point to take the liberty of quoting from Judge Hodges, who is one of the other judges of this Court, in a written opinion or from a written opinion that he entered in the case of Charles William Proffitt versus Wainwright. That was Case Number 79-655-Civ-T-H, arising from the Tampa

division of the Middle District of Florida. This is in regard to effective assistance of counsel, both at the trial stage and at the appellate stage.

First of all, Judge Hodges, quoting the case of McKenna V. Ellis, cited at 280 Fed. 2d 592, on page 599, quoted from that case. "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel and not counsel judged ineffective by hindsight but counsel reasonably likely to render and rendering reasonably effective assistance." And he cites some additional cases which you should see also. It's on the top of page 6 of that written opinion. And then Judge Hodges goes on to say: "The problematical question is by what standard does one measure the performance of counsel, what is effective or ineffective assistance? There is simply no objective test." And then note the footnote, wherein he says, "The problem is reminiscence of the difficulty presented by the obscenity cases prompting Mr. Justice Stewart to remark that a definition might be impossible but I know it when I see it."

Judge Hodges goes on to say, "We are taught only that a few errors or mistakes do not amount to ineffective assistance of constitutional significance because after all, even the best lawyers make mistakes and we are cautioned against the danger of judging by hindsight." Again, a footnote from Judge Hodges saying that the State cites Homer's Iliad 17, for the axiom that "After the event, even a fool is wise."

Again Judge Hodges goes on to say, "We are also admonished to avoid fragmentary fly specking and to determine whether reasonably effective assistance was rendered based on the totality of the circumstances and the entire record." And he cites United States V. Gray, 565 Fed 2d at 887. I'll end my quotes of Judge Hodges now.

But the Court is persuaded that this is a reasonable and proper standard and the way that this question should be addressed and looked at. And after addressing all of these alleged failures, the Court now, on balance, looking at the totality of the circumstances and the entire record, feels that this

allegation or that the allegation that there was ineffective assistance of counsel at the trial at appellate stage that rose to constitutional deprivation, fails.

And the finding which the Court has frankly found to be the most difficult problem of this case, and that is that the judgment and sentence is contrary to the Eighth and Fourteenth Amendment, and this is a Lockett situation.

MR. McCOUN: Your Honor, I don't know what the Court is going to rule on this issue, but I think there's something that I should have pointed out to the Court yesterday on this issue.

THE COURT: Well, I'm not hearing any argument now. I've made my decision. If I get off track, I may have a problem.

MR. McCOUN: You know what I'm concerned about is I know the Court has already made his decision, but what I'm concerned about is when this goes to the Court of Appeals, I don't want to be accused of waiving this one particular case. I intended to cite in the summation --

THE COURT: Is it the Spivey case?

MR. McCOUN: No sir. It's the Eddings V. Oklahoma case, a new Supreme Court case that came out two weeks ago, and I think it's important.

THE COURT: That's the case. I've seen that. That was in the Criminal Law Report.

MR. McCOUN: It just came out this week, I believe. I intended to point some things out about that case that I think will have bearing on this case.

THE COURT: Let me -- do you have that?

Let me look at one thing since you brought it to my attention. It's just another application of the Lockett case, as I remember.

MR. McCOUN: Yes sir, but it's important for the point that even though it wasn't raised at the trial level or appelate level, the Supreme Court still -- the Federal Court still took the issue and reversed the decision on those grounds. The Court looks at Chief Justice Burger's dissent, his chief dissent, his chief argument on dissent on the first page of the dissent is that this was not

even raised at trial or appelate level and the Court went ahead and reversed it anyway. When you talk in fundamental grounds that the Federal Court has the obligation and the duty to look at this.

THE COURT: Well, that does get into part of the problems in the Washington V. Watkins case.

Let me say this about it. Well, first of all, let me set forth what I understand the Petitioner's position to be, that the jury only considered statutory factors, mitigating factors. This was cruel and unusual punishment on its face, that the henious atrocious and cruel void for vagueness and the prosecutor improperly argued non-statutory factors. Primarily what this Court is concerned with is the Lockett V. Ohio problem. And Lockett V. Ohio holds that a sentencer must be allowed to consider the character and record of the individual offender and the circumstances of the offense in determining whether to impose the death penalty. Now, this case of Washington V. Watkins, and it's cited at 655 Fed 2d, 1346, is an application of that

holding.

I have looked at this in two ways, frankly. I've addressed the merits of the case or at least how it applies to this case and this petition, as well as some of the fundamental or the procedural questions raised in that case. First of all, this case, the Antone case, is unlike the Washington V. Watkins case procedurally in that the State in this habias case does contend that this claim is barred by Wainwright V. Sykes and the contemporaneous objection rule. That was not the case in Washington V. Watkins.

Secondly, in the Washington V. Watkins case, the Mississippi Supreme Court expressly addressed the merits of the Washington's Lockett claim in the direct appeal rather than applying the contemporaneous objection rule. Well, in this case, in the Antone case, the Florida Supreme Court did not consider that and obviously did apply the contemporaneous objection rule. So the Washington case procedurally is different. And by implication, at least, in the Washington case, the Court there said that if these two

facts had been in existence, then the Wainwright V. Sykes rule would be applicable and a waiver would apply. So I think that's a difference in our case and I think probably waiver does apply. But in addition to that, I think it's significant that the Washington case arose out of Mississippi, and under Mississippi law, and their statutory scheme of things, the jury is the sentencer. Under Florida law and under our Florida statutory scheme, the Judge is the sentencer. The jury merely renders an advisory opinion which, although entitled to great weight, is not binding on the Court. Consequently, the fact that the trial Judge may not have specifically instructed the jury they could consider non-statutory mitigating factors would not be error in the context of this case. Significantly, the trial Judge considered non-statutory factors in making his findings of fact. In particular, he considered and rejected defense counsel's argument that it would be unjust for the defendant to receive the death penalty when Haskew only got 35 years. The Petitioner has not argued that the Judge did not consider non-statutory mitigating

factors. In addition, the Petitioner has not proffered what other non-statutory mitigating factors could have been presented that were not presented. Rather, the Petitioner argues: one, that the prosecutor improperly led the jury to believe that they could only consider statutory factors; two, that the defense counsel should have let the jury know that they were not limited to statutory factors, and should have structured his argument so that this point was clear; and three, that the judge's instructions to the jury were improper.

To begin with, and I've already alluded to this, it should be noted that the Judge followed Florida's standard jury instruction when he gave the penalty phase instruction. It should also be noted that the language used by the trial Judge and contained in the standard instructions does not specifically limit the jury's consideration. Even if the ambiguity of the instruction coupled with the prosecutor's remarks did leave the jurors with the impression that they could only consider statutory factors, the error that resulted would have been harmless in light of

the fact that the jury is not the sentencer but only makes recommendations to the sentencer. So the Court is of the opinion that the issues raised by the alleged violations of Eighth and Fourteenth Amendment failed.

Having now addressed all of the issues raised by the petition of writ of habeas corpus, it is ordered that the petition is denied.

And I would request for counsel's benefit that the court reporter as soon as possible provide -- I assume you want a transcript, Mr. Corces.

MR. CORCES: Of the findings, Your Honor. I don't know it's necessary for the argument.

THE COURT: I'm talking about what I've just stated here today.

THE COURT: The State is ordering one?

MR. CORCES: Yes sir.

THE COURT: Now, what else, is there anything remaining?

MR. LAUDERBACK: Judge, we would move the Court enter a certificate -- we would

orally move that the Court enter a certificate of probable cause allowing us to appeal the Court's findings to the Eleventh Circuit.

THE COURT: It is so ordered. Do you want a written order on that?

MR. LAUDERBACK: Judge, I have both an Application and a Certificate.

THE COURT: Now, there is the question of the stay. There is an application for the Court.

MR. CORCES: Your Honor, may we suggest to the Court if necessary perhaps if the Court is considering the stay, to consider no longer stay, perhaps twenty-four hours than to give them time to file an application for stay in the Eleventh Circuit and let the Eleventh Circuit make that determination based on these findings that the Court has found.

THE COURT: What's the need for that, twenty-four hours, you might as well deny it.

MR. CORCES: Well, sir, what I'm saying is --

THE COURT: What can happen between now and twenty-four hours?

MR. CORCES: What I'm saying is that

I think it's the Eleventh Circuit that should make the determination as to whether or not to grant a stay. I think the scheduled execution is February 2nd, which is Tuesday. I don't know if they have enough time between now to have the Court's findings typed up and file their appeal and request for a stay in the Eleventh Circuit. And if they do not, and if the Court feels that they do not have enough time, perhaps give additional twenty-four hours beyond February 2nd, the stay for a period of twenty-four hours to give them time to --

THE COURT: I'm sure the Eleventh Circuit will act on this immediately.

MR. CORCES: Otherwise, we would object to the stay is what I'm pointing out to the Court.

MR. McCOUN: Judge, a stay of twenty-four hours is no help at all. The death warrant is effective now, as of noon today. If we're going to get Supreme Court review, I would respectfully submit to the Court that at least on some of the issues we think there should be further appellate review. I think this last issue especially in light of Ellis v. Ames 97.

Oklahoma warrants at least further review by the Circuit Court.

THE COURT: Well, I agree.

MR. McCOUN: And if we're going to get meaningful review -- the Court is aware, I'm not going to.

THE COURT: Well, they are going to stay this, I'm confident of that. I don't think there is any doubt about that. I'm going to deny the stay. I'll grant the Certificate of Probable Cause, but if for some reason they have not stayed this by late February 1st, I'll reconsider it.

MR. LAUDERBACK: Judge, if that's the case I think just so we're perfectly safe here, this death warrant is effective noon today through noon next Friday. The execution is presently scheduled for Tuesday, 7:00 a.m. the 2nd. Theoretically, under the warrant, the man could be executed right now. And I think for that reason, we would ask for a stay for sufficient time to get everything fowarded to Atlanta to get a hearing before them on a stay. Now perhaps you could enter a stay that would expire, say, Monday evening, which would allow

the State to go ahead and do whatever they want to do in the event the Eleventh Circuit turns us down. Technically, at this point the State could go ahead with an execution. If that happens, the stay and review just don't mean anything.

MR. CORCES: Your Honor, I can guarantee the Court that there's not going to be an execution prior to the scheduled February 2nd.

THE COURT: Do you have any objection to staying this until February 1st at 12:00 noon?

MR. CORCES: I would have no objections.

THE COURT: I will do that. And the Eleventh Circuit is going to act on it before then, I promise you.

MR. LANDRY: Judge, we submitted at the time we filed the petition, a form order granting the stay. It does not --

THE COURT: Would you get that for me, please. Let me handle this first and complete this application, Mr. Lauderback, if you would, it's not completed.

Today is the 29th. Here's the Certificate of Probable Cause.

Did you see a copy of this order? Why couldn't I just strike out -- it says, "Execution of the Petitioner is hereby stayed pending further order of this Court." Make it to read "The execution of Petitioner is hereby stayed until 12:00 noon, February 1."

MR. CORCES: Yes sir. I would see no problem with that, Your Honor.

THE COURT: Is that all right?

All right, I have entered this stay now. If you would look at it please, both sides, and make sure it's satisfactory.

MR. LANDRY: Judge, that having been done, we'll go ahead and file a Notice of Appeal with the Court now.

THE COURT: All right.

MR. LANDRY: I don't presume there is anything else to come before the Court that a change of jurisdiction would make any difference.

THE COURT: Is there anything else to come before the Court?

MR. CORCES: Mr. Antone has been in

the Hillsborough County Jail, pending any disposition by this Court as to whether or not we need his presence. I imagine there's no problem about returning him to the Florida State Prison.

THE COURT: No. In fact, doesn't that order indicate that's where he should be?

MR. CORCES: Yes sir, I think the order does indicate.

THE COURT: Anything else?

We'll be in recess.

THE MARSHAL: Would everyone please rise.

(Thereupon, the hearing was adjourned.)

STATE OF FLORIDA)

COUNTY OF HILLSBOROUGH)

I, ROSIE SCLAFANI, Official Court Reporter in and for the United States District Court, Tampa Division, do hereby certify that the hearing in the case of ANTHONY ANTONE vs. CLAYTON STRICKLAND, et al., was heard, commencing January 29, 1982, at 11:00 a.m., before Honorable George C. Carr, Judge, United States District Court, in Courtroom Number Three, second floor, Federal Building, Tampa, Florida; that I was authorized to and did report in Stenotypy and electronically the proceedings and evidence in said hearing and that the foregoing pages, numbered 1 through 37, inclusive, constitute a true and correct transcription of my recordings thereof.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 29th day of January, 1982, at Tampa, Hillsborough County, Florida.

Rosie Sclafani

ROSIE SCLAFANI
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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ELEVENTH CIRCUIT
FILED
FEB 1 1982

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 1 1982
ATLANTA, GA

NO. 82-5120

ANTHONY ANTONE,

Petitioner-Appellant,

versus

CLAYTON STRICKLAND, Superintendent, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and JIM SMITH, Attorney General, State of Florida,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

(1982)

Before TJOFLAT, FAY, and HENDERSON, Circuit Judges.

O R D E R:

Petitioner Anthony Antone has moved for a stay of execution pending this court's disposition of his appeal from the district court's denial of his petition for a writ of habeas corpus.[1/] Petitioner contends that we should grant the stay because his appeal is meritorous and only by staying

1/ The district court in denying the petition, issued its certificate of probable cause to appeal.

his execution can we properly consider the appeal. Because the district court's findings of fact and conclusions of law are not adequate to permit proper review, we remand this case to the district court so that it may prepare an adequate record. To give the district court time to accomplish this task, we temporarily stay petitioner's execution.

On January 6, 1982, the Governor of the State of Florida signed a warrant requiring the death of petitioner, a convicted murderer, by electrocution on some day of the week beginning noon Friday, January 29, 1982, and ending noon Friday, February 5, 1982. A Petition for Writ of Habeas Corpus was filed on January 22, 1982, in the United States District Court for the Middle District of Florida. On the same date, an Application for a Stay of Execution was also filed in the district court. The Petition for Writ of Habeas Corpus was denied on January 29, 1982. In addition, the district court denied a Stay of Execution beyond the scheduled execution date of February 2, 1982, but granted a temporary stay until 12:00 noon, Monday, February 1, 1982, to allow for application for a Stay of Execution in this court.

Operating under formidable time constraints, the district court did not enter a written order, but instead announced from the bench a lengthy order including findings of fact and conclusions of law, dealing with the many issues raised in the petition for the writ. The findings of fact and conclusions of law as presented in the transcript of the oral order, are not sufficiently complete or comprehensible to permit review. For example the district court relies on and

makes reference to materials which are not before us.[2/] We are simply not able to perform our function of reviewing the findings of fact and conclusions of law of the district court when those findings and conclusions are in the unreviewable form now before us.

Therefore, we remand this case to the district court so that it may enter findings of fact and conclusions of law sufficiently complete and reviewable to enable us to determine whether the appeal before us is meritorious. In order to expedite the resolution of this case, we retain jurisdiction and instruct the district court to certify its record to us forthwith, and no later than fifteen (15) days after the issuance of this order. We add that the record before us does not comprise all the matters which the district court had before it in considering this petition. The district court is instructed to ensure that the record before it when it enters its findings of fact is complete and includes all matters referred to in those findings.

In order to permit the district court to accomplish its task on remand, we order that petitioner's execution be stayed pending further order of this court.

2/ For example, there are several references to the presumptively correct findings of the state court without an account of what those findings were. In addition, there is a reference to Witt v. Wainwright (Civ. No. 80-545-Civ.-2-GC). Neither the record in that case nor the unpublished opinion deciding it is before us on this appeal.

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MIDDLE DIST. OF FLA. CT
TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANTHONY ANTONE,

Petitioner,

vs. Case No. 82-61-Civ-T-GC

CLAYTON STRICKLAND, Superintendent, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary Florida Department of Offender Rehabilitation, and JIM SMITH, Attorney General, State of Florida,

Respondent.

MEMORANDUM OF DECISION

On February 1, 1982, the Court of Appeals for the Eleventh Circuit remanded the above-captioned case to this Court requesting that more complete findings of facts and conclusions of law be entered. The following opinion is submitted in accordance with the Eleventh Circuit's instructions.

The petitioner, Anthony Antone, was found guilty of murder in the first degree on August 27, 1976.[1] Pursuant to Fla. Stat. §921.141 (1974), the jury recommended to the trial judge that the petitioner be sentenced to death. The trial judge accepted the jury's recommendation and sentenced the petitioner to death by electrocution. (Exhibit A at 926-30).[2] The petitioner appealed his conviction to the Florida Supreme Court. On February 16,

1/ The petitioner was charged with arranging the murder of a City of Tampa Police Detective, Richard Cloud. For a general statement of the circumstances surrounding the crime for which the petitioner was convicted, see Antone v. State, 382 So.2d 1205 (Fla. 1980).

2/ The Exhibits cited in this opinion are Exhibits A through I attached to the State of Florida's Response to the Petition for Habeas Corpus. Exhibit A is the record on appeal before the state court. Since the petitioner and the respondent both refer to this Exhibit as the Record or "R", references to Exhibit A shall hereafter be cited in this opinion as "R".

1978, the Court remanded the case to the trial court for a determination of whether a Brady v. Maryland, 393 U.S. 83 (1963), violation had occurred. Antone v. State, 355 So.2d 777 (Fla. 1978). The trial court found that there had not been a Brady violation and returned the case to the Supreme Court. State v. Antone, No. 76-1356 (Cir. Ct. June 16, 1978) (Exhibit F). On March 27, 1980, the Florida Supreme Court affirmed the petitioner's conviction and sentence. Antone v. State, 382 So.2d 1205 (Fla. 1980). The United States Supreme Court refused to grant a petition for writ of certiorari. Antone v. State, 449 U.S. 913 (1980).

The petitioner, along with Florida's other death row inmates, then filed a petition for writ of habeas corpus with the Supreme Court of Florida challenging the Court's review of extra-record material in capital appeals. The petition was denied by the Florida Supreme Court, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), and the United States Supreme Court thereafter denied certiorari. Brown v. Wainwright, 102 S.Ct. 542 (1981).

On January 6, 1982, the Governor of the State of Florida signed a death warrant requiring the petitioner's execution during the week beginning January 29, 1982. The execution was scheduled for February 2, 1982.

On January 15, 1982, the petitioner filed a Motion for Post-Conviction Relief with the Circuit Court of the Thirteenth Judicial Circuit. On January 19, 1982, the petitioner filed a second Motion for Post-Conviction Relief with that Court. The Circuit Court held a pre-evidentiary hearing on January 19, 1982, (Exhibit I), and an evidentiary hearing on January 21, 1982. (Exhibit H). On January 25, 1982 Circuit Judge Merckle entered written findings and denied both of the petitioner's motions. State v. Antone, No. 76-1356 (Cir. Ct. January 25, 1982) (Exhibit G). The petitioner appealed the denials to the Florida

Supreme Court. After hearing oral argument, the Supreme Court affirmed denial of both motions. The Court also denied a motion for stay of execution, a motion for writ of coram nobis and the petitioner's claim that he had been denied effective assistance of appellate counsel. Antone v. State, Nos. 61,594, 61,621 and 61,622 (Fla.Sup.Ct. Jan. 28, 1982) (per curiam opinion) [copy attached].

The petitioner filed for federal habeas relief on January 22, 1982. A hearing was held on the petition on January 28, 1982. At that hearing the Court heard argument on the issues raised in the petition and also considered whether any of the claims raised by the petitioner required an evidentiary hearing.[3] On January 29, 1982, this Court announced from the bench its decision denying the habeas corpus petition. The Court also granted a temporary stay of the petitioner's execution so that he could appeal the decision.

A transcript of the January 29, 1982 hearing is attached to this opinion. In that oral opinion, this Court considered the issues in the sequence that they had been presented in the petition. This written opinion shall follow the same sequence.

I. Jury Selection: Witherspoon Issues

The petitioner contends that the trial court improperly excluded veniremen who expressed philosophical or religious scruples against capital punishment. Specifically, the petitioner contends that Mr. Delgado (R. 993, 1000); Mrs. DeLaughter (R. 1028, 1029); Mrs. McCurdy (R. 1048, 1049); Mrs. Langsford (R. 1064, 1065); Mr. Minton (R. 1079, 1980); and Mrs. Bradley (R. 1080, 1081) were excluded in violation of the constitutional principles explained

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3/ At the hearing the petitioner's counsel stated that an evidentiary hearing was required in connection with his Witherspoon, Brady and ineffective assistance of counsel claims. For reasons discussed more fully in the Sections dealing with those issues, this Court has determined that an evidentiary hearing was not needed.

by the Supreme Court in Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Witherspoon case holds that it is unconstitutional to exclude veniremen who express conscientious or religious scruples against the death penalty. However, this holding does not diminish "the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the state's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse to even consider its imposition in the case before them." Witherspoon at 513.

The Court has reviewed the transcripts of the voir dire of the six veniremen who the petitioner contends were improperly excluded from the jury. The Court is satisfied that the questions asked of the five veniremen who were dismissed for cause and the answers they gave fully comport with Witherspoon. It is clear from the questions and the answers that these veniremen could not have upheld the law of Florida or their oaths as jurors.

Mr. Delgado's answers, on the other hand, establish that he could not have been excluded from the jury without violating Witherspoon principles. However, the record shows that he was not dismissed for cause but that the State used one of their peremptory challenges to strike him from the jury. The petitioner argues that the State prosecutors have a policy of using their peremptory challenges to strike jurors who have voiced reservations about imposition of the death penalty and he requested an evidentiary hearing on this issue. In the instant case, though, the only venireman allegedly stricken pursuant to this policy was Mr. Delgado. Significantly, the record reveals that Mr. Delgado stated during voir dire that he knew the

petitioner and had lived only three blocks away from him for a number of years. Thus, there was certainly a separate and sufficient reason for the State to exclude this juror. In light of these facts, an evidentiary hearing was not required. Rule 8(a), Rules Governing §2254 cases.

In conclusion, based upon the Court's review of the record and the argument of counsel, there is no showing that the petitioner's constitutional rights were abridged or that the constitutional principles enunciated in Witherspoon were violated.

II. Admission of Statements Illegally Obtained From Petitioner -- Payton Issues

This issue is an allegation that there was an admission of statements obtained from the petitioner in violation of his Fourth Amendment rights. Payton v. New York, 445 U.S. 373 (1980). The petitioner had a full and fair opportunity to litigate this claim in the state courts. See Fla.R.Cr.P. 3.190(h)(i). Consequently, this Court is precluded from considering the merits of this claim on a petition for federal habeas relief. Stone v. Powell, 428 U.S. 465 (1976). See Caver v. State, 537 F.2d 1333, 1335-36 (5th Cir. 1976).[4]

III. In Reviewing Petitioner's Conviction the Florida Supreme Court Acting Ex Parte Considered Material Outside the Record

The Court has previously addressed this identical issue in Witt v. Wainwright, No. 80-545-Civ-T-GC (M.D. Fla. May 14, 1981) (order granting motion to dismiss) [copy attached]. The Court hereby adopts by reference its May 14th Order granting the State's

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4/ It is appropriate to note that the Court has found no binding authority mandating retroactive application of the Payton decision. Moreover, the Court is of the opinion that the Payton decision, like the decision in Miranda v. Arizona, 384 U.S. 436 (1966), should be given prospective application. Thus, even if this Court could consider the petitioner's Fourth Amendment claim, it is doubtful that it would be found sufficient to entitle the petitioner to relief.

Motion to Dismiss. The fact that specific materials pertaining to this petitioner were furnished to the Florida Supreme Court does not affect the rationale of the Court's May 14th Order. Accord, Foster v. Strickland, 517 F.Supp. 597 (N.D. Fla. 1981).

IV. Failure of the State to Provide Identity and Existence of Exculpatory Witness

The petitioner contends that the State did not disclose the existence of an exculpatory witness, Robert Bruns, and that this failure amounted to a Brady violation. Brady v. Maryland, supra. State Circuit Court Judge Merckle held an evidentiary hearing on this question on January 21, 1982. Judge Merckle found that the State had no knowledge of any exculpatory information possessed by Bruns. Title 28, United States Code, Section 2254(d) provides that the findings of a state court as to factual matters are presumed to be correct unless one or more of the circumstances set out in paragraphs one through seven of Section 2254(d) are deemed to exist or the state court record does not fairly support the Court's factual determination. Sumner v. Mata, 449 U.S. 539 (1981).

The petitioner has not shown how paragraphs one through seven apply. Although his request for a continuance was denied, it is clear from the transcript of the proceedings that Judge Merckle would have given the petitioner as many recesses as he needed to prepare and present his case. (Exhibit H at 108-19; Exhibit I). Moreover, Judge Merckle's refusal to grant the petitioner's motion for the appointment of an expert witness did not deprive the petitioner of a full, fair and adequate state hearing. As Judge Merckle noted in denying the motion, he did not need the expert opinions of practicing attorneys to help him decide whether or not the petitioner's trial counsel had been ineffective. (Exhibit G at 6). In addition, after reading the

transcript of the evidentiary hearing, I find that the record fairly supports Judge Merckle's decision.

Consequently, based upon the facts as found by Judge Merckle, I conclude that no Brady violation occurred in connection with Bruns' nondisclosure.

V. Petitioner Was Denied His Right to a Fair Trial

The petitioner contends that he was denied his right to a fair trial because the trial judge committed numerous errors. As petitioner's counsel indicated at oral argument, the petitioner does not contend that the individual trial errors, standing alone, would rise to the level of constitutional deprivation. Rather, it is the cumulative effect of these manifold errors that rendered the trial fundamentally unfair.[5] The individual errors will be discussed separately and then their cumulative impact will be considered.

a. Denial of Petitioner's Motion to Suppress in Violation of Payton v. New York, 445 U.S. 373 (1980)

For the reasons given in Section II, supra, consideration of this issue is precluded by Stone v. Powell, 428 U.S. 465 (1976).[6]

b. The Denial of Petitioner's Motion to Disclose the Identify of a Confidential Informant

Police investigating the Richard Cloud murder were contacted by a confidential informant one month after the killing. (R. 201-09). The informant told the police that Marlow Haskew had approached him and asked him whether he wanted a contract to kill

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5/ It should be noted that petitioner's counsel stated at oral argument that the admission of evidence concerning unrelated crimes (Section V(c)), in and of itself, was sufficient to deprive the petitioner of a fair trial.

6/ It is appropriate to note that the petitioner's contention that the trial court erred in denying the suppression motion reinforces this Court's conclusion that the petitioner did have a full and fair opportunity to raise his Fourth Amendment claim in the state courts, Section II, supra, thereby precluding collateral review by this Court.

a City of Tampa undercover policeman. Id. The informant later recanted his story. (R. 208-09).

The State accused the petitioner of hiring Marlow Haskew and another man to kill Cloud. Thus, the petitioner contends that the informant's testimony would have been highly relevant and would have shown that Haskew, not the petitioner, was the mastermind of the killing. The petitioner argues that the informant's story would have been particularly important in the penalty phase to assess whether the petitioner should have received the death penalty.

The watershed case discussing the confidential informer's privilege is Roviaro v. United States, 353 U.S. 53 (1957). In that case, the Supreme Court constructed a balancing test to determine when the "fundamental requirements of fairness" require disclosure of an informer's identity or the contents of his communication. Id. at 60-61. The Court held that the informer's privilege must give way when disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of the cause." Id. In the instant case, the defense was given the contents of the informant's communications. (R. 201-09). They also knew that the informant had recanted his story and that Haskew had denied any involvement in the incident. Moreover, as the Florida Supreme Court noted "the confidential informant was not present at any material point in this incident and did not testify." Antone v. State, 382 So.2d 1205, 1214 (Fla. 1980). It is also significant that the trial judge expressly found that it was the petitioner, not Haskew, who was the mastermind of the killing and that the judge had full knowledge of the confidential informant's story. (See R. at 929-30).

In light of these facts, it is difficult to see how the trial judge's denial of the Motion to Compel Disclosure of the Confidential Informant's Identity was constitutional error.

c. The Repeated Admission into Evidence of Testimony Relating to Other Criminal Acts

The petitioner cites several parts of the record, where he alleges the trial court erroneously allowed in evidence of criminal acts unrelated to the Cloud murder. (R. 1371), (R. 1463-64), (R. 1466-67), (R. 1480-81), (R. 1484-85), (R. 1507). The challenged rulings all involve the testimony of Marlow Haskew, the driver of the getaway car and the State's key witness. During his testimony Haskew made several statements concerning unrelated crimes. In particular, Haskew made reference to bombing a car (R. 1463). This comment was in large part volunteered by the witness and the judge instructed the jury to disregard it. (R. 1469-70). The Court also warned counsel to make sure that they did not solicit evidence of unrelated activities. (R. 1465-69). Haskew further testified that the Cloud killing had been one of five killings for which the petitioner had given him a contract. (R. 1459-61). The trial judge allowed this testimony to come in, reasoning that it was an integral part of the conspiracy giving rise to the Cloud killing. Later on in his testimony, Haskew stated that Antone had asked him to speed up Cloud's murder because Vic Acosta "and a lot of his people" wanted Cloud killed in order to prevent Cloud from testifying before the grand jury. (R. 1480-82). The Court once again overruled defense counsel's objection to this testimony. (R. 1481). The trial judge also allowed in testimony concerning who had designed the cardboard box used to collect spent shells from the murder weapon. (R. 1484-85). In the course of explaining who had designed the box, Haskew stated that Antone was familiar with the cardboard box idea because "they had sent Joe Joe Bedami and some other guy up to Maryland to ...." (R. 1485). The prosecutor interrupted Haskew and never allowed him to finish the statement. As with Haskew's reference to the car bombing, this statement was volunteered by the witness before the trial court was even asked to rule on its

admissibility. Finally, Haskew was allowed to testify concerning a telephone conversation he had with Antone while Haskew was in police custody. (R. 1507). However, the tape recording of this conversation was subsequently introduced and played for the jury and, in this proceeding, the petitioner has not challenged the propriety of allowing the jury to hear the actual recording. (R. 1512; see R. 165-72).

In light of the circumstances surrounding the admission of the challenged evidence, it does not appear that the judge committed error, let alone error of constitutional magnitude. Hills v. Henderson, 529 F.2d 397 (5th Cir. 1979). Indeed, considering the nature of the crime charged, it is difficult to see what realistically could have been done to sanitize Haskew's testimony.

d. The Trial Court Erred in Allowing in Testimony From Marlow Haskew Concerning the Conversation He Had With Buck Gilford

Buck Gilford was the triggerman and Marlow Haskew drove the getaway car. The trial judge allowed Haskew to relate what happened immediately following the Cloud killing including what Buck Gilford said to him about the murder. (R. 1497-98). The Court allowed the testimony on the grounds that Gilford was a co-conspirator. Once again, this evidentiary ruling does not appear to have risen to the level of constitutional error. In addition, although the defense attorney did contemporaneously object, it does not seem that this claim was ever raised on direct appeal or in any collateral proceedings. See Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977). See generally, Wainwright v. Sykes, 433 U.S. 72 (1977).

e. The Trial Court Allowed Improper Cross-examination of Larry Miller and George Mims

The petitioner called Larry Miller and George Mims to impeach Richard Jantos, a state witness, and to develop the theory

of defense. On cross-examination, the prosecutor was allowed to impeach both witnesses by asking them questions about prior bad acts. Both Larry Miller and George Mims refused to answer, claiming a Fifth Amendment privilege. (R. 1676, 1680, 1682, 1685). The petitioner contends that this cross-examination exceeded the scope of direct and emasculated the presentation of his defense. The impeachment appears to have been permissible under Florida law. See Fla. Stat. §90.608 (1978). However, whether or not allowing the cross-examination was error under Florida law, the record does not show how the cross-examination rendered the petitioner's trial fundamentally unfair. It should be remembered that "[f]ederal courts do not sit to review state evidentiary questions." Mercado v. Massey, 536 F.2d 107, 108 (5th Cir. 1976).

f. The Trial Court Committed Errors in the Sentencing Phase

The petitioner contends that the trial court committed three specific errors in connection with the sentencing phase. They are (1) dismissal of veniremen who voiced conscientious objections to the death penalty in violation of Witherspoon v. Illinois, supra; (2) allowing the state to tell the jurors that they could only consider statutory mitigating factors; and (3) improperly instructing the jury as to what factors they could consider. The Witherspoon issue has already been discussed and rejected. Section I, supra. The other two claims will be considered in Section VII, infra.

For the reasons given above, the Court finds that none of the separate errors identified by the petitioner amounted to constitutional error. The Court has also examined the trial errors in combination and has determined that their cumulative impact did not destroy the fairness of the proceedings. Although the petitioner may not have received a perfect trial, he did receive a constitutional one. See generally Buchalter v. New

York, 319 U.S. 427 (1942); Bryson v. Alabama, 634 F.2d 862, 864-65 (5th Cir. 1981).

VI. Petitioner Was Denied Effective Assistance of Counsel as Guaranteed by the Sixth Amendment at Trial and On Appeal

The next issue presented is that petitioner was denied effective assistance of counsel at the trial and on appeal. For the purposes of clarity, the Court will first discuss the assistance received at trial and then discuss effective assistance on appeal.

TRIAL COUNSEL

At the outset, the Court notes in reviewing the record that plaintiff has failed to carry his burden regarding these and other ineffective assistance claims because plaintiff's counsel refused to let trial counsel testify at the evidentiary hearing on plaintiff's Motion for Post-Conviction Relief.[7] Obviously, trial counsel could have shed more light on these issues than anyone else. It is well-established that the petitioner's claim of ineffective assistance of counsel necessarily waives the attorney-client privilege. Laughter v. United States, 373 F.2d 326 (5th Cir. 1967). Because the privilege was invoked, there is an absence of fact to support the plaintiff's claims. Certainly, the petitioner should not be entitled to an evidentiary hearing on the ineffective assistance of counsel claims before this Court when an evidentiary hearing was held in the state court on this matter but the petitioner refused to present evidence.

7/ Trial counsel Angelo Ferlita was one of two attorneys representing the petitioner at the evidentiary hearing on the Motion for Post-Conviction Relief. The Court also heard argument on separate motions filed by Attorney McCoun regarding petitioner's ineffective assistance of counsel claims. When the State called Ferlita to testify, Ferlita asserted the attorney-client privilege. However Mr. Alfonso, Mr. Ferlita's associate and co-counsel at trial, did testify briefly at the evidentiary hearing concerning the change of venue question.

a. Trial Counsel's Failure to Move For a Change of Venue

This contention was considered by State Circuit Judge Merckle at an evidentiary hearing on petitioner's Motion for Post-Conviction Relief. Judge Merckle found that the failure to request a change of venue was a joint strategic decision made by counsel and the petitioner. (Exhibit G at 7 and 9). Under Sumner v. Mata, 449 U.S. 539 (1981) and 28 U.S.C. §2254(d), this Court must presume that Judge Merckle's factual determination was correct. Based on the facts as found by Judge Merckle it is clear to the Court that trial counsel's failure to move for change of venue was not ineffective assistance of counsel. See Lee v. Wainwright, 457 F.2d 771 (5th Cir. 1972).

b. Trial Counsel's Inquiry Into the Knowledge of Each Venireman of Pre-trial Publicity Concerning the Petitioner and its Effect on Each Prospective Juror

The petitioner argues that trial counsel was ineffective because (1) there was no request that the jury panel should be sequestered during voir dire, (2) the veniremen were not questioned individually regarding their knowledge of the case and of the defendant, and (3) trial counsel made an insufficient inquiry during voir dire into the knowledge of each venireman of pre-trial publicity concerning the petitioner.

Insofar as the claims presented under this Section are concerned, the Court has reviewed the transcript of the voir dire in its entirety and finds that the procedures and questions of trial counsel were adequate to protect the plaintiff from any prejudice. (R. 988-89, 1005-06, 1008-09, 1018-19, 1032-33, 1038-39, 1052, 1058-59, 1062-63, 1067, 1074, 1084, 1093-94). Although, in hindsight, there may have been some other questions to ask or another attorney may have conducted the voir dire phase differently, the voir dire conducted by trial counsel was adequate and certainly does not rise to the level of ineffective assistance of counsel.

c. Trial Counsel's Failure to Ask Questions or Object to the Dismissal for Cause of the Venireman Who Expressed Death Penalty Scruples

The Court has already ruled that the questions asked and the answers given during voir dire fully comport with Witherspoon v. Illinois, 391 U.S. 510 (1968). While these questions were only asked by the prosecutor, the answers elicited justified excusal for cause and there was no reason for trial counsel to pursue these answers any further.

d. Trial Counsel's Failure to Object to the Introduction of Petitioner's Statements on the Grounds That the Statement Was the Result of an Illegal Arrest in Violation of Petitioner's Fourth Amendment Rights and Payton v. New York, 445 U.S. 373 (1980).

This Court has already determined that review of this claim is precluded by Stone v. Powell, 428 U.S. 465 (1976). (Section V(a)). As an offshoot of the Payton argument, petitioner also asserts that trial counsel was ineffective by failing to object to the admission of petitioner's post-arrest statements. First, it should be noted that petitioner's arrest preceded the Payton decision by four years. At the time of trial, the law in Florida was firmly established that no arrest warrant was needed to secure the arrest of a suspect in his home. State v. Perez, 277 So.2d 778 (Fla. 1973). Significantly, counsel did move to suppress the statements on Fifth Amendment grounds and also moved to suppress evidence obtained pursuant to a search warrant. Under the circumstances, trial counsel rendered reasonably effective assistance in dealing with petitioner's arrest and post-arrest statements.

e. The Trial Counsel Did Not Effectively Investigate the Case, in That They Failed to Discover an Essential Witness to the Defense

Here, the petitioner contends that his attorneys would have discovered Robert Bruns had they adequately investigated the case. It is not necessary to determine trial counsel's degree of preparation and the thoroughness of his investigation since this

Court has already concluded, based on the facts found by Judge Merckle, that Bruns' testimony would in no way be exculpatory. (Exhibit G at 2-5). As noted above, this Court must presume that Judge Merckle's factual determination was correct. Sumner v. Mata, 449 U.S. 539 (1981).

f. Trial Counsel's Failure to Cite to the Court Appropriate Law Limiting Areas of Impeachment of Plaintiff's Witnesses Resulted in an Emasculation of the Defense Case Presented by Witnesses Larry Miller and George Mims

Again, the Court has already noted that the petitioner failed to present any factual basis for finding that the cross-examination of these two witnesses resulted in a fundamentally unfair trial. In any event, the Court has reviewed the entire testimony of Larry Miller (R. 1675-78) and George Mims (R. 1678-88) and notes that trial counsel made several substantative objections throughout the course of cross-examination. (R. 1675; R. 1680-82). Thus, the Court concludes that trial counsel's failure to cite any case law to limit the impeachment of these witnesses does not rise to the level of ineffective assistance of counsel.

g. Trial Counsel Failed to Provide Effective Assistance of Counsel During the Penalty Phase of the Trial Resulting in an Arbitrary and Capricious Imposition of the Death Penalty.

Under this Section, the petitioner alleges five errors of trial counsel which resulted in ineffective assistance of counsel. These five errors will be grouped into three separate areas.

1. Failure By Petitioner's Trial Counsel To Present Other Mitigating Circumstances Outside The Statutorily Prescribed Factors.

At oral argument, petitioner's counsel was specifically asked what other nonstatutory mitigating factors could have been presented that were not presented. Petitioner's counsel conceded that he could not think of any additional nonstatutory mitigating factors to present. The argument then, that trial counsel failed to present other nonstatutory mitigating factors, has been abandoned. It is significant to note that trial counsel did

introduce into evidence a certified copy of petitioner's file from the Department of Offender Rehabilitation (R. 1888-89) and used the file to argue both statutory and nonstatutory mitigating factors.

2. Failure By Petitioner's Trial Counsel To Counter The Prosecutor's Presentation During The Penalty Phase That The Process Of Deciding The Recommendation Of Death Was One Of Counting Aggravating And Mitigating Circumstances And Failure Of Petitioner's Trial Counsel To Tell The Jury That Both Statutory and Nonstatutory Mitigating Circumstances Could Be Considered

The Court has reviewed trial counsel's argument to the jury during the penalty phase (R. 1889-1944) and concludes that trial counsel effectively argued in mitigation. As the Court has stated, this issue was not developed as well as one would have hoped at the evidentiary hearing on the petitioner's Motion for Post-Conviction Relief because of the failures already pointed out. In hindsight, the Court may not have chosen to argue that way or another attorney may have argued differently, but the trial counsel's presentation of mitigating factors certainly does not rise to the level of ineffective assistance.

3. Trial Counsel's Failure to Request a Special Jury Instruction Which Would have Cleared Up the Deficiencies in the Standard Instructions Employed by the Court.

Petitioner argues that trial counsel was ineffective for failing to urge an instruction that the jury could consider nonstatutory mitigating circumstances. The Court notes the instruction actually given was the Florida Standard Jury Instruction given in all capital cases. It would have been very difficult at that time to persuade any state judge to give any instruction other than the standard instruction. The failure to request a special jury instruction on nonstatutory mitigating circumstances would not be ineffective assistance of counsel.

In sum, the Court has considered all of the alleged errors cited in Sections VI(a) through VI(g) within the totality of the

circumstances of the entire trial and concludes that trial counsel provided reasonably effective assistance of counsel.

APELLATE COUNSEL.

The plaintiff also contends that he was denied effective assistance of appellate counsel, Before handling the specific errors alleged, the Court must point out that State Circuit Judge Merckle did not have jurisdiction to handle this claim and therefore no evidentiary hearing was provided. While the petitioner has requested an evidentiary hearing on this claim before this Court, the Court concludes that an evidentiary hearing is not necessary because appellate counsel's performance can be evaluated by a review of the appellate briefs and the transcript of the trial.

h. Petitioner was represented on mandatory appeal by one of his trial attorneys. Petitioner was denied effective assistance of appellate counsel in that counsel did not include the following meritorious claims:

1. The Jury Selection Was Contrary to the Limitations and Dictates of Witherspoon v. Illinois, 391 U.S. 510 (1968)

The Witherspoon issue has already been discussed and rejected. Section I, supra. A review of appellate counsel's brief demonstrates that it contained many alleged errors and was fifty pages in length. This Court has been involved with litigation long enough to know that the longer an appellate brief is, the more difficult it is to point out in a concise and cogent way the issues that are most significant and upon which the appellate court should focus. The failure to raise the Witherspoon issue in light of the other arguments presented in the brief is understandable. In this Court's opinion, it would have been one of the weakest issues.

2. Appellate Counsel's Failure to Raise the Payton Issue

The Payton issue has already been discussed and rejected. Sections II and VI(d), supra. As already indicated, Payton had

not even been decided at the time this case was appealed and the state of the law in Florida at that time was contrary to Payton. Reasonable assistance of appellate counsel does not include an obligation to raise issues on appeal in those areas of the law which appear well-settled.

3. Appellate Counsel Was Ineffective in Failing to Raise Certain Potential Evidentiary Errors

This Court has considered the potential errors earlier in this opinion (Section V, supra) and in light of the Court's comments on each of these alleged errors, failure to raise some of them on appeal would not rise to the level of ineffective assistance of counsel.

4. Appellate Counsel Was Ineffective in Failing to Raise Ineffective Assistance of Trial Counsel

It is significant to point out that Attorney Ferlita, petitioner's appellate counsel, was also petitioner's counsel at trial. Petitioner now makes the rather ludicrous assertion that Attorney Ferlita, as appellate counsel, should have alleged on direct appeal that he was ineffective in his assistance to the petitioner at trial. This argument makes no sense to the Court and borders on the ridiculous. Moreover, the appropriate mechanism in Florida for attacking a conviction on the grounds of ineffective assistance of appellate counsel is on a petition for habeas corpus before the state court. Knight v. State, 394 So.2d 997 (Fla. 1981). Had Attorney Ferlita asserted his own ineffectiveness, the Supreme Court of Florida would have been without jurisdiction to hear the claim.

5. & 6. Appellate Counsel Was Ineffective in Failing to Raise the Inadequacy of the Trial Court's Jury Instruction Regarding Mitigating Circumstances.

Because of their similarity, the Court will handle jointly petitioner's arguments concerning the presentation and consideration of mitigating circumstances. These allegations refer to the so-called Lockett problem. Lockett v. Ohio, 438 U.S. 586 (1978).

The adequacy of the trial court's instruction regarding aggravating and mitigating circumstances will be discussed in Section VII, infra. Here, the issue is whether appellate counsel was ineffective in failing to raise the jury instruction issue on appeal. At the time of this appeal, the Lockett case had not even been decided. It is too much to expect that this appellate counsel or any other counsel would be the innovator who would point out the problems raised by Lockett.

This Court has now reviewed all of the ineffective assistance of counsel claims presented by the petitioner. At this point the Court would like to take the opportunity to quote from Judge Hodges, another district judge of this Court, who has aptly set forth the standard for reviewing ineffective assistance of counsel claims. In Proffitt v. Wainwright, No. 79-655 Civ-T-H (M.D. Fla. November 7, 1980), Judge Hodges wrote:

> The seminal authority on this point in the Fifth Circuit is MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960):
>
> > 'We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'
>
> See also, e.g., Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974); United States v. Gray, 565 F.2d 881, 887 (5th Cir. 1978); and Lovett v. Florida, ___ F.2d ___, No. 79-2304, October 8, 1980, Slip Op. p. 208.
>
> The problematical question is: By what standard does one measure the performance of counsel? What is effective (or ineffective) assistance? There is simply no objective test.* We are taught only that a few errors or mistakes do not amount to ineffective assistance of constitutional significance because, after all, even the best lawyers make mistakes; and we are cautioned against the danger of judging by hindsight.** We are also admonished to avoid fragmentary flyspecking and to determine whether 'reasonably effective assistance was rendered based on the totality of the circumstances and the entire record.' United States v. Gray, supra, 565 F.2d at 887.

* The problem is reminiscent of the difficulty presented by the obscenity cases prompting Mr. Justice Stewart to remark that a definition might be impossible 'But I know it when I see it...' Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683 (1964) (concurring opinion).

** The State cites Homer's, Illiad XVII for the axiom that 'After the event even a fool is wise.'

The Court is persuaded that this is the reasonable and proper standard for determining effective assistance of counsel. After addressing all of these alleged failures, the Court concludes that on balance, taking into account the totality of the circumstances and the entire record, the allegations of ineffective assistance of counsel at the trial and on appeal, do not rise to the level of constitutional deprivation.

VII. The Judgments and Sentences of Death Are Contrary to the Eighth and Fourteenth Amendments to the United States Constitution

The petitioner has identified several errors in the penalty phase of his trial. Principally, he contends that the trial court limited jury consideration of the mitigating factors to the statutory factors contained in Fla. Stat. §921.141(6). In other words, the petitioner is alleging that a Lockett violation occurred. Lockett v. Ohio 438 U.S. 586 (1978).

Lockett v. Ohio, supra, holds that a sentencer must be allowed to consider the "character and record of the individual offender and the circumstances of the offense" in determining whether to impose the death penalty. The Fifth Circuit Court of Appeals' decision in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), which the petitioner relies on in support of his clai for relief, is an application of that holding.

Unlike Washington v. Watkins, supra, the State in the instant case does contend that the petitioner's death penalty claims are foreclosed from federal habeas review because he faile to make a contemporaneous objection during the penalty phase. Wainwright v. Sykes, 433 U.S. 72 (1977). Moreover, once again in

contrast to Washington v. Watkins, supra, the State courts in this case have applied the contemporaneous objection rule. E.g., Antone v. State, Nos. 61,594, 61,621 and 61,622, slip op. at 9-10 (Fla.Sup.Ct. Jan. 28, 1982). Consequently, the petitioner's procedural default would preclude collateral review by this Court absent cause for the procedural default and actual prejudice from the error. Tyler v. Phelps, 643 F.2d 1095, 1100-02 (5th Cir. 1981). At oral argument, petitioner's counsel asserted that Wainwright v. Sykes, supra, would not bar the petitioner's penalty phase claims because the failure to object to these errors was due to trial counsel's ineffectiveness. This "cause" for the procedural default has been discussed in connection with the ineffective assistance of counsel claims. (Section VI). In addition, for the following reasons, the Court finds that no prejudice has been established.

Significantly, the Washington case arose out of Mississippi. Under Mississippi law, the jury is the sentencer. Miss. Code Ann. §99-19-101. Under Florida law, however, the judge is the sentencer. Fla. Stat. §921.141(2). The jury merely renders an advisory opinion which, although entitled to great weight, is not binding on the Court. Consequently, the fact that the trial judge may not have specifically instructed the jury that they could consider nonstatutory mitigating factors would not be error in the context of this case since the trial judge actually considered nonstatutory factors in making his findings of facts. (R. 926-30). In particular, he considered and rejected defense counsel's argument that it would be unjust for the defendant to receive the death penalty when Haskew only got 35 years. Id. The petitioner has not argued that the judge did not consider nonstatutory mitigating factors. In addition, the petitioner has not proferred what other nonstatutory mitigating circumstances could have been presented that were not presented. Rather, the

petitioner argues (1) that the prosecutor improperly led the jury to believe that they could only consider statutory factors; (2) that the defense counsel should have let the jury know that they were not limited to statutory factors and should have structured his argument so that this point was clear; and (3) that the judge's instructions to the jury were improper.

To begin with, it should be noted that the judge followed Florida's Standard Instructions when he gave the penalty phase instructions. It should also be noted that the language used by the trial judge (and contained in the standard instructions) does not specifically limit the jury's consideration. But even if the ambiguity of the instruction coupled with the prosecutor's remarks did leave the jurors with the impression that they could only consider statutory factors, the error that resulted would have been harmless in light of the fact that the jury was not the sentencer but only made a recommendation to the sentencer. See Chapman v. California, 386 U.S. 18 (1967).

In addition to the Washington decision, the petitioner has cited the Supreme Court's recent opinion in Eddings v. Oklahoma, 50 U.S.L.W. 4161 (Jan. 19, 1982) in support of his contention that his death sentence is unconstitutional. The Eddings opinion, like that in Washington, is merely an application of Lockett v. Ohio, supra, and stands for the proposition that a sentencer must be allowed to consider any aspect of a defendant's character and background before a capital sentence is imposed. See Eddings v. Oklahoma, 50 U.S.L.W. 4161, 4165 (Jan. 19, 1982) (O'Connor, J., concurring). As previously noted, the sentencer did consider aspects of the petitioner's background and character that were not specified in Fla. Stat. §921.141(6). As a result, the petitioner has not shown sufficient prejudice to satisfy the requirements of Wainwright v. Sykes, supra.

Although the main thrust of the petitioner's argument concerning the death penalty phase was directed towards the jury's consideraton of only statutory mitigating factors, he has also identified two other errors in the penalty phase.

First, he contends that the prosecutor argued nonstatutory aggravating factors. A review of the transcript belies this contention. In connection with aggravating factors (f) and (g), the prosecutor noted that the murder was for pecuniary gain and that its purpose had been to disrupt the lawful operation of the grand jury. Later on, in summarizing the aggravating factors he thought were present, the prosecutor described the killing as a "murder for hire". (R. 1898). Clearly, the prosecutor's comments fell within the scope of aggravating factors (f) and (g) and did not divert the jury's attention to nonstatutory factors.

The petitioner has also asserted that aggravating factor (h), i.e., that the crime was "especially heinous, atrocious, or cruel", is void for vagueness and could not properly support imposition of the death sentence. If this had been the only aggravating factor found by the trial court, it would be necessary to consider the merits of the petitioner's "void for vagueness" argument. In this case, however, the Court found three other aggravating factors and no mitigating circumstances.[8] Therefore, the unconstitutionality of this one aggravating factor would not invalidate the petitioner's death sentence. Accord, Antone v. State, 382 So.2d 1205, 1216 (Fla. 1980).

VIII. Conclusion

For the foregoing reasons, I find that all of the claims raised by the petitioner must fail. Therefore, his petition for writ of habeas corpus is DENIED.

The Clerk of the Court is directed to transmit to the Eleventh Circuit Court of Appeals a certified copy of the record on appeal.

8/ It is important to note that in this proceeding the petitioner has not argued that the trial court failed to find statutory mitigating factors.

DONE AND ORDERED in Chambers in Tampa, Florida this 18TH day of February, 1982.

Gray C. Carr

UNITED STATES DISTRICT JUDGE

SEP 08 RECD

Anthony ANTONE, Petitioner,

v.

Charles STRICKLAND, Superintendent, Florida State Prison, Louie L. Wainwright, Secretary, Florida Department of Offender Rehabilitation, and Jim Smith, Attorney General, State of Florida, Respondents.

No. 82-5120.

United States Court of Appeals, Eleventh Circuit.

Sept. 6, 1983.

Appeal from the United States District Court for the Middle District of Florida.

ON PETITION FOR REHEARING

(Opinion June 13, 1983, 11th Cir.1983, 706 F.2d 1534)

Before FAY and KRAVITCH, Circuit Judges, and YOUNG *, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by the Appellee Strickland is GRANTED. Subsequent to our opinion in *Antone*, the United States Supreme Court decided *Barclay v. Florida*, — U.S. —, 103 S.Ct. 3418, 76 L.Ed.2d — (1983). In *Antone*, we remanded the cause to the district court to consider the effect of *Barclay*. Because *Barclay* has been decided, we withdraw the following language from *Antone*:

> As in *Ford*, however, we note that the United States Supreme Court has accepted certiorari of *Barclay v. Florida*, 411 So.2d 1310 (Fla.1982), *cert. granted*, — U.S. —, 103 S.Ct. 340, 74 L.Ed.2d 382 (1982). We therefore remand to the district court to consider the effect that *Barclay* may have on the denial of habeas corpus relief to *Antone*.

706 F.2d 1534, 1539. We substitute the following language:

> Our declination conforms to the United States Supreme Court's recent decision in *Barclay v. Florida*, — U.S. —, 103 S.Ct. 3418, 76 L.Ed.2d — (1983), where the Court concluded "there is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstance could not possibly affect the balance." *Id.* at —, 103 S.Ct. at 3445.

With the above substitution, the case need not be remanded and the district court's denial of habeas corpus relief is AFFIRMED.

* Honorable George C. Young, U.S. District Judge for the Middle District of Florida, sitting by designation.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
SEP - 6 1983
Spencer D. Mercer
Clerk

NO. 82-5120

ANTHONY ANTONE,

Petitioner,

versus

CHARLES STRICKLAND, Superintendent, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and JIM SMITH, Attorney General, State of Florida,

Respondents.

- - - - - - - - - -

Appeal from the United States District Court for the Middle District of Florida

- - - - - - - - - -

(September 6, 1983)

Before FAY and KRAVITCH, Circuit Judges, and YOUNG,* District Judge.

O R D E R:

IT IS ORDERED that the suggestion for rehearing en band is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26).

/s/ PETER T. FAY
UNITED STATES CIRCUIT JUDGE

*Hon. George C. Young, U. S. District Judge for the Middle District of Florida, sitting by designation.

IN THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA.

CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA)
vs.) Case No. 76-1356
ANTHONY ANTONE) Division D
)

MOTION TO SUPPRESS A CONFESSION OR ADMISSION ILLEGALLY OBTAINED

COMES NOW the Defendant, ANTHONY ANTONE, by and through his undersigned attorney, pursuant to Rule 3.190(i), of the Florida Rules of Criminal Procedure, and moves this Honorable Court to suppress as evidence at the trial, any and all written and oral statements made by the Defendant to the Police or other agent of the State of Florida, and states as grounds the following:

1. Written or oral statements or admissions were obtained from the Defendant in violation of the Defendant's right to counsel guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution as interpreted by the United States Supreme Court in Miranda vs. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d, 694 (1966).

2. The statements or admissions made by the Defendant are a result of an unlawful delay by the Police in taking the Defendant, after arrest, before the nearest or most accessible Magistrate in the County.

WHEREFORE the reasons stated hereinabove, the Defendant prays this Honorable Court to suppress as evidence, any and all written or oral statements or admissions obtained from the Defendant by the Police or other agents of the State of Florida.

DIECIDUE, FERLITA & PRIETO
601 Twiggs Street, Suite 203
Tampa, Florida 33602

Angelo M. Ferlita
Attorneys for Defendant

Motion Heard, Considered and Denied, Exception Noted This 20 day of 1976

Judge

726

143a

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Aaron K. Bowden, Assistant State Attorney, this 16th day of August, 1976, by ~~hand delivery~~ mail.

ATTORNEY

MOTION HEARD, CONSIDERED AND
_____ EXCEPTION
NOTED THIS _____ 19__

_____
JUDGE

727

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CRIMINAL DIVISION
Case No: 76-1356 D

STATE OF FLORIDA

vs.

ANTHONY ANTONE

Motion Heard, Considered and _____. Exception Noted This _____ 19__

_____
JUDGE

CLERK CIRCUIT COURT JAN 20 1 PM '82

MOTION TO VACATE SENTENCE

The Defendant, ANTHONY ANTONE, by and through his undersigned counsel, and pursuant to Fl.R.Cr.P., 3.850, moves the Court to vacate the judgment and conviction entered in this case as well as the sentence of death entered in this case on the grounds that they were entered and imposed in violation of the Constitution and laws of the United States and of the State of Florida and alleges:

I

STATEMENT OF THE CASE

The judgment and sentence sought to be reviewed by this Motion is the judgment and sentence of death entered by the Circuit Court of Hillsborough County on August 27, 1976. (Exhibit A). A direct appeal was taken to the Florida Supreme Court. The cause was remanded to the trial Court for the purpose of determining whether there had been a Brady and Agurs violation in the State's failure to timely disclose information regarding fees paid to an attorney for Ellis Marlow Haskew, the prosecution's chief witness against Antone. The Supreme Court's opinion was reported at 355 So.2d 777 (Fla., 1978). After an Evidentiary Hearing in the trial court wherein the trial judge found no Brady violation, the cause was again appealed to the Supreme Court. There, the judgment and sentence of the trial court was affirmed in a per curiam opinion reported at 382 So.2d 1205 (Fla., 1980). A Petition for Writ of Certiorari filed in the United States Supreme Court to review the decision of the Florida Supreme Court, was denied without opinion, on October 14, 1980, with two justices dissenting. One previous Motion has been filed pursuant to F.R.Cr.P. 3.850, by the trial counsel for Antone. The issue raised in that

Motion deals with newly discovered evidence, and Brady violations (Exhibit B). The undersigned counsel has volunteered his services to file this Motion which raises substantial and different constitutional issues.

II

NATURE OF THE RELIEF SOUGHT

The defendant seeks an Order vacating the sentences of death and an Order staying the execution of the judgment and sentence of the Court pending final disposition of this Motion.

III

STATEMENT OF THE FACTS

The defendant was tried and convicted of the First Degree Murder of Richard Cloud. The facts upon which the conviction was based show that Richard Cloud, a suspended police officer with the Tampa Police Department, was shot to death in his home on October 23, 1975. Witnesses at the scene could not identify the perpetrators but stated that a latin looking male holding a box was seen running from the Cloud residence and climbing in a car driven by another latin looking male (R-1161-1167)

Thereafter, on February 25, 1976, Ellis Marlow Haskew was arrested in Miami, Florida, by Larry Campbell of the Florida Department of Criminal Law Enforcement. After initial denials and after discussions regarding a possible deal, Haskew confessed to being the driver of the getaway car. Haskew implicated Buck Gilford as the triggerman. Haskew implicated the defendant as the person who gave him information regarding five contracts for murder from Vic Acosta; as the person who supplied the murder weapon and as the person who gave him money for the killing. Haskew, then made a phone call to the defendant, at his residence. Defendant returned the call to Haskew at a pay phone. This conversation was tape recorded by Campbell. Thereafter, Antone was arrested without an arrest warrant, in his home at approximately 10:00 p.m. by a joint task force of agents from Tampa Police, the Florida Department of Criminal Law Enforcement, Hillsborough County Sheriff's Office, and the Federal Bureau of Investigation. These agents

entered defendant's house with guns drawn, defendant was cuffed, and then dressed by police. (R-1277-1278) (R-1585, 1592-1594), (R-1707), (R-2040-2043). Defendant apparently suffered what was later determined to be a mild myocardial infarction. In the subsequent interview that evening at the F.B.I. office, and Tampa General Hospital, defendant made the statement that he was a 100% Sicilian, and Sicilians didn't fink on anybody. He also asked if he was goint to have to testify &, in another pre-arranged call to Haskew, asked, "Marlow why are you doing this to me." (R-1585 -1607). On February 26, 1976, a joint task force executed a search warrant at defendant's home and seized numerous items later used as evidence against the defendant, including a rattan couch, and a .32 calibre slug found therein, as well as air- conditioning filters taken from a separate workshop on defendant's property. (R-1283, 1284; 1314-1328).

The Court refused a pre-trial motion for disclosure of a witness who claimed he had been recruited by Haskew to do a contract murder of a police officer and who stated that the defendant's name was never mentioned during these discussions with Haskew. At trial, the State produced physical evidence taken from the victim's residence, including .32 calibre slugs and casings, and box and glass fibers taken from the front door. (R-1170-1198). Experts from the F.B.I. linked up the bullet taken from the victim's leg with the other slugs found in victim's house and the one slug found inside the rattan couch at defendant's residence. (R-1437-1438). Further, expert testimony attempted to show a comparison between glass fibers found at the scene of the homicide and glass fibers seized in the search of the defendant's residence. (R-1578).

Ellis Marlow Haskew testified at length regarding his criminal relationship with the defendant (R-1452-1536). Haskew indicated it was defendant who in September, 1975, advised him that Vic Acosta had put out five contracts for murder, including one for the victim. (R-1459-1461) Haskew testified that earlier, in June, 1975, he had other conversations with the defendant and Manuel Gisport, concerning contracts for murder. He further testified that pursuant to those discussions of June, 1975,

he and the defendant "placed a bomb under the car of Manuel Garcia, and " (R-1463). Haskew then testified that some 10 days prior to the victim's murder, the defendant told him that Vic Acosta wanted Cloud killed in order to prevent Cloud from being reinstated and to prevent him from testifying before a grand jury regarding Acosta and his operations. (R-1480-1482).

Haskew further testified to constructing a box to be used in the murder to conceal the weapon and catch the ejected cartridges fired during the murder. Haskew, when asked whose idea it was to use the box, stated that, "I'm not certain. I know the idea Antone came up, he told me that they had sent Joe Bedami, and some other guy up to Maryland to . . ." (R-1485) . Haskew further testified that on February 25, 1976, after his arrest and at the insistence of Agents of the FDCLE and the F.B.I., he had a phone conversation with the defendant, in which he spoke with the defendant about counterfeit money. (R-1507). A tape recording of this conversation was also introduced into evidence. (R-1512)

Haskew went on to testify that he received the murder weapon from the defendant; that he had test fired it in the defendant's house by shooting it into the rattan couch. (R-1474) He stated that they used glass fibers from the air-conditioning filters in the defendant's workshop to repack the silencer which was on the gun. (R-1476) He further stated he used more of this material later to repack the gun after he and Buck Gilford had test fired the weapon in anticipation of the murder. (R-1483-1484)

Haskew stated that after the murder, the defendant supplied him with $7000-$8000 in cash for the killing. (R-1499)

Haskew was also allowed to testify to a conversation he had subsequent to the killing with the triggerman, Buck Gilford, regarding what had occurred during the actual murder. (R-1492-1498)

F.B.I. Agent, Joe Arwine, testified to statements (related above) made by the defendant subsequent to his arrest.

Richard Jantos then testified that the defendand had, in

October or November 1975, discussed with him the manufacturing and design of gun silencers and that the defendant stated he had made one for Vic Acosta which he had test fired in his home. The witness denied ever possessing any silencer. (R-1612-1614)

The defendant presented several witnesses to discredit Haskew's reputation for truth and veracity. (R-1653-1666) Defendant also presented George Mims who stated he had seen Jantos in possession of a silencer. (R-1678-1680) Larry Miller, testifying as a defense witness contradicted Haskew on whether or not they had test fired the gun together as Haskew had testified. (R-1675) The Court allowed extensive cross-examination bearing on these witnesses credibility.

Finally the defendant testified and denied any involvement in the murder.

Subsequent to defendant's conviction, the State of Florida produced evidence that Marlow Haskew's attorney had received several thousand dollars in legal fees from law enforcement.

Recently, new evidence has come to light concerning the existence of additional witnesses and tangible evidence bearing upon this case. These matters have been raised by defendant's trial counsel in his own motion to vacate and will not be set out here.

Defendant's retained counsel never moved prior to trial for a change of venue, in spite of the considerable pre-trial publicity attending this homicide.

During the selection of defendant's trial jury, six veniremen were excused either by peremptory challenge or for cause solely on account of their conscientious or religious scruples against the death penalty. Mr. Delgado (R-983, 1000) Mrs. DeLaughter (R-1028, 1029), Mrs. McCurdy (R-1048,1049), Mrs. Langsford (R-1064,1065), Mr. Minton (R-1079,1080), Mrs. Bradley (R-1080,1081).

During Voir Dire defendant's counsel made no inquiry regarding the death penalty. (R-949-1095) Further, no objection was lodged against the prosecutor's questions regarding the death penalty, or the Court's excusing for cause all those jury members questioned who voiced death penalty scruples. (R-983, 1029, 1049, 1065,

During the penalty phase the prosecutor argued four aggravating factors and no mitigating factors. He further argued "Those are the only mitigating factors under the statute. This defendant does not qualify for one mitigating factor, not one. He qualifies under four of the statutory aggravating factors." Defendant's counsel argued that two statutory mitigating factors applied, but did not attempt to present evidence or argument or any other factors in mitigation. The Court used the standard jury instruction to instruct the jury regarding the death penalty and the jury returned an advisory verdict of death. (R-1886-1922) (Attached as Exhibit C)

Thereafter, the defendant was sentenced to death by the trial court judges. (R-1925, 1926)

IV

REASONS FOR GRANTING THE MOTION

The defendant submits that the judgments and sentences were entered in violation of the State and Federal Constitutions on the following grounds:

ONE

JURY SELECTION - WITHERSPOON

THE JUDGMENT AND SENTENCE OF DEATH ARE UNCONSTITUTIONAL AND IN VIOLATION OF DEFENDANT'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT. RIGHTS IN THAT DURING VOIR DIRE EACH AND EVERY VENIREMEN WHO EXPRESSED CAPITAL PUNISHMENT SCRUPLES WAS EXCLUDED EITHER PEREMPTORILY BY THE PROSECUTOR OR FOR CAUSE AT THE REQUEST OF THE PROSECUTOR

The exclusion of each and every veniremen who expressed philosophical or religious scruples against infliction of the death penalty violated defendants constitutional rights in that:

(a) the exclusions were inconsistent with the constitutional requirements for capital cases laid down in Witherspoon v. Illinois, 391 U.S. 510 (1968); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969); Mathis vs. New Jersey, 403 U.S. 946 (1971); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, 100 S.C. 2521 (1980).

(b) the exclusion violated the defendant's Sixth and Fourteenth

Amendment rights under the U.S. Constitution and Article 1, §§9, 16, and 22 of the Florida Constitution, in that the defendant was denied a representative jury selected from a cross-section of the community to act as a fair and impartial arbiter. Witherspoon v. Illinois, (supra), Glassen v. U.S., 315 U.S. 60.

(c) the exclusions, which had no reasonable or rational basis other than to preclude any person with death penalty scruples from sitting as a juror, and therefore were not in furtherance of any legitimate State interest denied the defendant due process and equal protection of the law in that such a jury panel could not in fact be a representative cross-section of the community.

(d) the complete exclusion of those veniremen who expressed death penalty scruples was contrary to the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, §17 of the Florida Constitution as the resulting jury panel could not provide that necessary "link between contemporary community values and the penal system", Woodson v. North Carolina, 428 U.S. 280 (9176), nor could such a jury express the conscious and opinion of a representative cross-section of the community, Witherspoon v. State of Illinois, supra.

(e) the exclusions of each and every juror with death penalty scruples by using both peremptory challenges and challenges for cause substantially circumvented the rule in Witherspoon. The complete exclusion of that segment of the community with death penalty scruples resulted in a jury which was biased in favor of capital punishment. "Culled of all who harbor doubts about the wisdom of capital punishment - of all who would be reluctant to pronounce the extreme penalty - such a jury can speak only for a distinct and dwindling minority" Witherspoon at p. 520.

See also, People vs. Wheeler, 58 P2 748 (Calif.); Commonwealth v. Soares, 387 N.E.2d 499 (Mass.); People v. Thompson, 435 N.Y.Supp. 2d 739 (N.Y.); Brown v. Louisiana, 371 So^2 351 (Louisiana). Wherein the Courts have placed the burden upon the State to justify the complete and systematic exclusion of jurors with death penalty scruples.

The defendant submits that six veniremen were improperly excluded by the State either peremptorily or for cause during the voir dire examination There can be little doubt that there was a systematic exclusion by the State of prospective jurors with death penalty scruples, as the record bears out that each and every veniremen who voiced a conscientious objection to the death penalty was excused by the State. Not one venireman who expressed a concern about capital punishment was left on the jury panel.

In Witherspoon v. Illinois, 391 U.S. 510 (9168), the Court recognized that a defendant in a criminal case has a Sixth Amendment right to a fair and impartial jury composed of a representative segment of the defendant's community. As stated at p. 522

> ... we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced several objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

The Court recognized in Witherspoon that even those jurors who were unalterably opposed to the death penalty quite possibly could nonetheless put aside their personal views and perform the duty to obey the laws of the State and fulfill his oath. For this reason the Court noted at p.515 n.9 : V

> Unless a veniremen states unambiguously that he would automatically vote against the imposition of capital punishment, no matter what the trial might reveal, it simply cannot be assumed that that is his position.

While the similar questions propounded to Mrs. DeLaughter, Mrs. McCurdy, Mr. Minton, and Mrs. Bradley, that is: "do you have a conscientious or moral objection to the death penalty such that you could not render a verdict of guilty in this case even though the evidence may be beyond and to the exclusion of every reasonable doubt because you know that person might be sentenced to death", and each veniremen's response of "yes", (R-1029, R-1049, R-1079, R-1080, respectively), touches upon one aspect of the standard, no further

inquiry was made of the veniremen. Not one was asked if he or she could subordinate his views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State. Not one was asked whether because of his conscientious belief he could never vote to recommend the death penalty. Not one was asked whether they could remain impartial and render a fair decision inspite of their beliefs. Without such inquiry the veniremen were improperly excluded. Without such inquiry the Court was left to assume that each venireman could not follow the law and obey his oath. The Court in Witherspoon specifically instructed

> it cannot be assumed that a juror who describes himself as having conscientious or religious scruples against the infliction of the death penalty or against its infliction in a proper case, thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him. 391 U.S. 510, at 515 n 9.

In regards to Mrs. Langsford, the prosecutor proceeded in this fashion: (at R-1064, line 10)

Prosecutor: Mrs. Langsford and Mrs. Wynne, did each of you understand the question that I posed concerning the possible imposition of the death penalty? Did you, Mrs. Langsford.

Juror: Yes, I do.

The prosecutor then inquired of another juror, and after being informed of that juror's answer, returned to Mrs. Langsford: (at R-1064, line 23)

Prosecutor: Do you, ma'am?

Juror: I do, I am sorry.

Prosecutor: Are you saying, Ma'am, that you feel that you could not follow the law of the State of Florida becuase of that conscientious objection.

Juror: Right.

Prosecutor: I suggest cause, your honor.

The Court: Step down please, call another juror.

Such abbreviated inquiry by the State cannot satisfy the requirements set out in Witherspoon. Neither the questioning by the prosecutor, nor the response of the juror result in an unambiguous or unmistakably clear indication that such a person

would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial or that the juror's attitude toward the death penalty would prevent them from making an important decision as to the defendant's guilt. See Witherspoon, at p. 522 n. 21. Without a clear statement by the juror of what her conscientious objection relates to and without a clear statement that this belief would preclude her from being impartial, the State and the Court cannot justify their action in excluding such a juror except on the basis of an impermissable assumption.

In Davis v. Georgia, 429 U.S. 122, (1976) the Supreme Court reversed a death sentence where one venireman was improperly excused for cause. Citing Witherspoon, and subsequent cases the Court stated:

> Unless a venireman is irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of facts and circumstances, that might emerge in the course of the proceedings he cannot be excluded ever though not so committed, any subsequently imposed death penalty cannot stand.

Such an inquiry was never made in this case and that inquiry which was made falls woefully short of this standard.

As stated in Adams v. Texas, 100 S.Ct. at p. 2527 (1980)

> it is clear beyond per adventure that Witherspoon is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment, any broader basis than inability to follow the law or abide by their oaths, the death sentence cannot be carried out.

It is submitted here that, the jury that imposed or recommended the death penalty, was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. The prosecutor and Court went outside the limitations of Witherspoon and therefore the death penalty cannot be upheld.

The final infringement of defendant's Sixth and Fourteenth Amendment rights occur in the peremptory challenge of the only other jurors to express death penalty scruples. While questioning

Mr. Delgado, the following occurs: (at R-983, 984, beginning line 18)

Prosecutor: My question is: In the first phase of the trial, keeping in mind your feelings concerning the death penalty, are those feelings so strong that you could not follow the law and find a verdict of guilty if the State proves its case beyond and to the exclusion of every reasonable doubt?

Juror: Yes, I could.

Prosecutor: I am sorry, I can't hear you.

Juror: I guess I will go along with you.

Prosecutor: Well, you say you guess.

Juror: I could, yes.

Prosecutor: You feel that you could?

Juror: Yes.

No further inquiry was made of Mr. Delgado. Nevertheless, and inspite of his assurance that he could be impartial, Mr. Delgado was excused for cause.

The State systematically used its peremptory challenges and challenges for cause to organize and compose a jury which held no conscientious belief regarding the death penalty. Certainly, in this manner, the defendant has been intentionally denied an impartial jury which is representative of the conscious and opinion of his community, and thereby denied his Sixth, Eighth, and Fourteenth Amendment rights: Taylor v. Louisiana , 419 U.S. 522 (9175) Smith v. Texas, 311 U.S. 128 (1940)

TWO

THE JUDGMENT AND SENTENCE OF THE COURT WAS ENTERED IN VIOLATION OF DEFENDANT'S FOURTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ARTICLE 1 §12 OF THE FLORIDA CONSTITUTION

As stated in the Statement of Facts, the defendant was arrested without a warrant, while inside his home at approximately 10:00 p.m. on February 25, 1976. The arrest was effected by a joint task force of Tampa Police Officers, Hillsborough County Sheriff Deputies, F.B.I. and FDCLE Agents. Several members of the task force knocked on defendant's door and then entered defendant's

residence with their weapons drawn. Defendant was handcuffed, dressed by police, given medication for his heart condition, and removed from his residence to the officers of the F.B.I.

Although, the law was unsettled at the time, it is now clearly established that such actions by law enforcement are an unconstitutional infringement of defendant's Fourth and Fourteenth Amendment rights. Payton v. New York, 445 U.S. 373, (1980)

The issue in Payton and Riddick was whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. The facts in Riddick had New York Police Officers going to the defendant's house without a warrant to effect a felony arrest. When the officers knocked on the door, it was opened by defendant's child. They entered the house and placed defendant under arrest. The Court went into an extensive review of the history of the Fourth Amendment and set out several principles:

First: " The simple language of the [Fourth] Amendment applies equally to seizures of persons and to seizures of property"

Second: "The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."

Third: "It is a basic principle of the Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable."

and Fourth: " To be arrested in ones home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home. This is too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accompanied under statutory authority and when probable cause is clearly present."

In reversing the judgments because of the failure of the Police to obtain arrest warrants, the Court held that the Fourth Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643; Wolf v. Colorado, 338 U.S. 25, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home

in order to make a routine felony arrest.

Obviously, the opinion in Payton was announced long after the hearing and trial of this cause. Nevertheless, the law announced in Payton should be given retrospective application. It is an opinion founded upon an interpretation of the Fourth Amendment to the United States Constitution and is a development in the law of fundamental and constitutional significance. Further, by its wording, it is made applicable to the States and is of such basic and fundamental importance that retroactive application is required, and the judgment and sentence must be reversed.

THREE

THE FAILURE OF THE STATE OF FLORIDA TO ADVISE THE DEFENDANT OF THE EXISTENCE OF WITNESSES AND TANGIBLE EVIDENCE KNOWN BY THE STATE TO POSSESS AND CONTAIN EXCULPATORY MATTERS CONSTITUTES A DENIAL OF DUE PROCESS UNDER THE UNITED STATES CONSTITUTION AND FLORIDA CONSTITUTION

As stated in the first Motion to Vacate Sentence filed by defendant's trial counsel, new evidence has come to the knowledge of trial counsel regarding the existence of two witnesses, Robert Bruns, and his wife. The failure to disclose the identity of these witnesses and the existence of tangible evidence is contrary to law set down in Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976).

FOUR

DEFENDANT WAS DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL.

Numerous rulings entered by the trial court effectively precluded the defendant from receiving a fair trial. In the interest of time and space, they are outlined below:

(a) the denial of the defendant's Motion to Suppress unlawfully obtained statements which were the product of an unconstitutional infringement on defendant's Fourth and Fourteenth Amendment rights. Payton v. New York, 445 U.S. 373 (1980)

(b) The denial of defendant's Motion to Disclose the Identity of a Confidential Informant. Through depositions of Det.J.R. Martelli, and Maj. W. Heinrich, trial counsel became aware of the existence of a confidential informant. This informant indicated to law enforcement that he had been contacted by Marlow Haskew

the principal witness against the defendant, in September, 1975 regarding whether or not he would participate in a contract murder of an undercover police officer. This Confidential Informant indicated that the defendant was never mentioned in connection with that plan to murder. Subsequent to Haskew's arrest, the informant met with the joint task force and again told of his meeting with Haskew. The failure of the Court to order disclosure of this informant denied defendant a fundamental Sixth Amendment Right to produce witnesses in his favor. The chief theory of defense was that the murder was the work of Marlow Haskew, not Anthony Antone. This informant substantially corroborated this theory in his statement to police. The denial of this witnesses identity precluded the defendant from effectively exercising his Sixth Amendment right, which right is made applicable to the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400. Furthermore, the testimony of such informant, in corroborating the defendant's version could not be considered immaterial or irrelevant. The informant's testimony went directly to the issue of the defendant's guilt or innocence and the denial of the Motion to Compel his or her identity precluded the defendant using what would have been an essential witness.

(c) The repeated admission into evidence of testimony relating to other criminal acts of the defendant unrelated to the charge of murder for which defendant was on trial totally and effectively precluded the defendant from receiving a fair trial as guaranteed by the Sixth and Fourteenth Amendments of the U.S. Constitution.

The trial court repeatedly allowed the State through its witness Marlow Haskew to introduce, over strenuous objection by the Defense, testimony involving the defendant in criminal activities totally unrelated to the charge of murder:

i) at (R-1463):

Q: Prior to that time, that conversation at Mr. Antone's house, Mr. Haskew, had you ever had any other conversations with him concerning any contracts?

A: Yes, I had many, and a man by the name of Manuel Gispert.

Q: Who is Manuel Gispert?

A: He is a friend of Anthony Antone's

Q: When did these conversations take place?

A: In June, sometime in June, and also in July

Q: Where did these conversations take place?

A: At Anthony Antone's House

Q: Who was present during these conversations?

A: Myself, Manuel Gispert, and Anthony Antone

Q" What conversation during that period of time, June, 1975, did you have with this defendant, Anthony Antone.

A: Well, we placed a bomb under the car of Manuel Garcia, and...

This testimony had no relevance at all to the murder of Richard Cloud. The trial court acknowledged this by stating, "I don't think any of that has anything to do with this murder." (R-1464) Further, the court acknowledged that there was no exception under the Williams Rule (R-1466, 1467). Inspite of this and in spite of the tremendous prejudicial effect of such statement upon the minds of the jury, the trial court allowed the case to proceed.

ii) At (R-1480, 1481), wherein the court allowed the prosecutor to link up one Joe Joe Bedami with the defendant, and further allowed them to indicate that Bedami was facing a pending federal charge.

(iii) At (R-1484, 1485) , wherein Haskew in speaking about the box which was used to conceal the murder weapon and to catch the ejected casings, was asked at (R-1485)

Q: Whose idea was it to use that device, if you know?

A: I'm not certain, I know the idea Antone came up, he told me that they had sent Joe Joe Bedami and some other guy up to Maryland to....

Although the witness stopped short of completing his statement the clear import of the testimony, which had no relevance to the charge, was that Antone and Bedami had used such a device before and for the purpose of murder. The prosecutor acknowledged this by stating. "Of course, what he was getting ready to say was, of course, Judge that they sent someone up to Maryland to kill somebody using that cardboard box." (R-1486)

(iv) at (R-1507), wherein Haskew was testifying regarding a phone conversation he made to the defendant at the request of the agents of the FDCLE who admittedly coached (R-1371) Haskew

on what to say, Haskew testifies beginning on line 21:

> ... and when he told me, well, he said, " this guy called me the other night and talked to me about that funny money, that counterfeit money on my phone, you know.

The cumulative effect of this testimony was to implicate the defendant, in a prior car bombing, a prior murder and counterfeiting. None of these charges were relevant to the crime for which defendant was charged. The Court specifically instructed & confine the prosecutor to " the package deal" (R-1469) which was the five contract murders. Haskew testifed to which began around September 12, or 13th, 1975. (R-1459) (R-1461). Inspite of its ruling the court repeatedly allowed evidence of other crimes. The evidence did not reasonably tend to prove the defendant was guilty of the crime of murder and amounted to a higly prejudicial showing of propensity to commit crimes. Such evidence is contrary to the dictates of Williams v. State, 110 So.2d 654, (Fla. 1959) and Ashley v. State, 265 So.2d 685 (Fla., 1972).

(d) The trial court seriously erred by allowing, over objections by Defense Counsel, testimony from Marlow Haskew concerning a conversation he had with Buck Gilford, the triggerman in this homicide, subsequent to the murder of Richard Cloud. Such testimony resulted in an obvious denial of the defendant's Sixth Amendment Rights of confrontation as Gilford was not a witness in the trial and could not be compelled to testify. The testimony did not come within any recognized exception to the hearsay rule and specifically it was clearly not within the co-conspirator exception as the statement was not made during the course of the conspiracy, and clearly it was not in furtherance thereof. Its prejudicial effect cannot be questioned for during the conversation Gilford told Haskew that the killing of this human being was no different than "shooting a dog".

(e) The trial court improperly permitted the prosecutor to cross-examine defense witnesses, Larry Miller, and George Mimms far beyond the scope of the direct examination and by means of impeachment not recognized as permissible under the law. These

witnesses were called by the defendant, both to impeach State witness Richard Jantos and to aid in developing their theory. The trial court allowed this aspect of the defendant's case to be emasculated by permitting the prosecutor to inquire regarding specific prior bad acts, thereby causing the witnesses to assert their Fifth Amendment privilege against self-incrimination in the presence of the jury. (R -1676, lines 3-10) (R-1680, lines 12-17), (R-1682, lines 5-21) (R-1685, 1686) Urga v. State, 155 So.2d 719 (2 DCA, 1963); Roberson v. State, 24 So 2d 474 (1898)

(f) With regards to the sentencing phase of the trial the defendant was denied a fair trial in several respects. First, the court wrongfully dismissed for cause, at the request of the prosecution, each and every juror who expressed a conscientious or religious objection to the death penalty. As indicated above ths systematic removal of those veniremen with death penalty scruples was a substantial and fundamental denial of defendant's Sixth, Eighth, Fourteenth, Amendment rights. Secondly, the defendant was denied a fair trial during the penalty phase by the court permitting the State to argue for the death penalty by stating that the only mitigating factors were those contained in the statute. Clearly, that was not at the time nor is it today the law. The prejudice to the defendant is substantial in light of the third fact which is that the court in charging the jury during the penalty phase, informed them of nothing to the contrary. The jury was left with the incorrect impression that the determination of the recommendation of death is nothing more than a counting process of X numbers of aggravating factors and Y number of mitigating factors: Clearly, it is not. State of Floria v. Dixon, 283 So.2d 1 (Fla., 1973); Lockett v. Ohio, 989 S.Ct. 2954 (1978).

Assuming in arguendo, that the rulings by the trial court when examined individually are not sufficient in and of themselves to constitute a denial of fair trial, the cumulative effect of these rulings when examined in toto establishes a substantial diminution of defendant's Sixth Amendment right. Where such a trial results in a conviction and recommendation of death, the judgment should not be allowed to stand.

THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE IF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT, AT THE TRIAL OF HIS CAUSE AND ON APPEAL

The defendant was denied reasonably effective assistance by trial counsel in that:

(a) trial counsel failed to file a motion with the court requesting a change of venue allowed under Rule 3.240 F.R.Cr.P.

(b) Trial counsel failed to request that the jury panel be sequestered during voir dire, and that the veniremen be questioned individually regarding their knowledge of the case.

(c) Trial cousnel made an insufficient inquiry during voir dire into the knowledge of each veniremen regarding the defendant.

(d) trial counsel made an insufficient inquiry during voir dire into the knowledge of each veniremen of pre-trial publicity concerning the defendant, and its effect on each prospective juror.

The murder of Richard Cloud was a highly sensational and publicized case. The homicide had several spectacular aspects which the media exploited to the utmost. The victim was an undercover narcotics officer on suspension from the force; the murder had indications of being a mob-type execution. There was extensive media coverage of the homicide as well as the investigation. A joint task force of city, state and Federal law enforcement officers was formed to find the murderers. Every development in the case was publicized. When the defendant was arrested, considerable publicity resulted. The publicity and media coverage continued up to the day of trial and thereafter during the trial, and still continues to this day.

The failure of trial counsel to move for a change of venue was a serious mistake. During voir dire it became apparent that approximately half of the jurors had read or heard about the case in the media. At that point it became incumbent on trial counsel to inquire of the jury the effect of that pre-trial publicity. The record bears out that the inquiry which was made was insufficient, limited to such questions as "how many articles have you read?" There was no searching or probing of the jurors to find out

just exactly what pre-disposition or bias they might be bringing into the trial. Perhaps out of fear that such questions might lead to answers which could poison the other juror, the questions were limited. A reasonable alternative would have been to request sequestration and individual voir dire examination.

Without, either moving the trial to another jurisdiction which had not been inundated with publicity, or seriously inquiring into the effects of that publicity on the minds of the veniremen , trial counsel could in no way assure that the defendant's Sixth Amendment Right to a trial by an impartial jury was being met.

There should be little argument that the jury panel selected did not give intensive consideration to the four days of testimony and fifty plus items of tangible evidence. Even less consideration was given to the penalty phase. Clerk minutes as well as the Record on Appeal show that the jury spent less than two hours on the guilt phase and only 24 minutes on the penalty phase.

(e) It is apparent from the record that trial counsel did not understand the significance or importance of Witherspoon v.Illinois, in that:

i) Defendant's trial counsel did not ask a single question during voir dire regarding the veniremen's beliefs or opinions as to capital punishment.

ii) Defendant's trial counsel did not voice a single objection to questions propounded by the prosecutor regarding capital punishment.

iii) Defendant's trial counsel did not voice a single objection to the Court's dismissing for cause five of the six veniremen who expressed death penalty scruples, without full inquiry.

iv) Defendant's trial counsel made no request or effort to voir dire these six veniremen to determine whether or not, inspite of their death penalty scruples, the veniremen could still abide by the law and provide defendant with a fair trial.

At a bare minimum counsel in a death penalty case must during voir dire, explore the prospective jurors opinions regarding capital punishment. In capital cases as in no other criminal cases it is imperative that the veniremen express their opinions

on the death penalty. If trial counsel is going to insure that his client is tried before fair and impartial jury which fairly and truly is representative of the community inquiry absolutely must be made.

The failure to make inquiry coupled with the prosecution's systematic and complete exclusion of those veniremen with death penalty scruples left the defendant with a jury panel which was in favor of capital punishment and without any death penalty scruples at all. As a result, a legitimate class of persons was excluded from this jury panel. The jury as composed was not a "body truly representative of the community" Smith v. Texas, 311 U.S. 128 (1940). The failure of trial counsel, amounted to a substantial denial of defendant's Sixth, Eighth, and Fourteenth Amendment Rights under the U.S. Constitution. One only has to look into the record to see that this jury panel spent less than 30 minutes to decide the issue of life or death.

(f) The trial counsel failed to render effective assistance during the pre-trial motions, and during the trial by failing to object to the introduction of defendant's statement, on the grounds that the statement was the result of an illegal arrest in violation of defendant's Fourth Amendment rights. Payton v. New York, 445 U.S. 373 (1980). The Payton court ruled that such an illegal arrest without a warrant was such a substantial infringement of the Fourth Amendment rights that the judgments and sentences had to be reversed.

g) The trial counsel did not effectively investigate the case, in that they failed to discover an essential witness to the defense.

In the trial counsel's own Motion to Vacate, he states that he has recently discovered the existence of a witness, Robert Bruns, and the existence of tangible evidence. Should the Court rule at hearing on that motion that such information was in fact disclosed to the defendant, through discovery or that such information was readily discoverable through appropriate discovery means, then defendant was denied an important and essential witness for his defense. Such witness would have provided both direct

evidence and substantial corroboration to the defendant's case and further would have provided an effective means of impeaching the State's chief witness Marlow Haskew.

h) trial counsel's failure to cite to the court appropriate law limiting areas of impeachment of defendant's witness resulted in an emasculation of the defense case presented by witnesses, Larry Miller, and George Mimms. Although this portion of the testimony was limited in scope it was at the center of the Defense theory argued to the jury that Richard Jantos was involved in the homicide rather than the defendant. The failure of counsel to cite accepted and established law limiting areas of impeachment completely destroyed the effectiveness of that portion of defendant's case.

i) the penalty portion of the trial clearly shows a lack of understanding on the part of trial counsel, of the law on capital punishment. This denial of effective assistance of counsel during penalty phase infected the reliability of the penalty determination and resulted in the arbitrary and capricious imposition of a death sentence.

The basic lack of comprehension of the law pertaining to capital punishment resulted in:

1) a failure by the defendant's counsel to present other mitigating circumstances outside the statutorily prescribed factor.

2) a failure by the defendant's counsel to counter the prosecutor's presentation during the penalty phase that indicated that process of deciding the recommendation of death was one of counting aggravating and mitigating factors.

3) a failure of defendant's counsel to clarify the statement by the prosecutor at (R-1896) "These are the only mitigating factors under the statute. This defendant does not qualify for one mitigating factor, not one. He qualifies under four of the statutory aggravating factors" Clearly under Dixon v. State, 283 So.2d 1 (Fla. 1973) published three years earlier, that was a mistatement of the law.

4) the failure of trial counsel to argue mitigating factors

outside of the statute lent considerable credence to the State's presentation indicating that the penalty phase was merely a counting process. Clearly trial counsel could have argued as a separate mitigati factor the unequal punishment for the same crime that existed between Marlow Haskew and the defendant. Clearly, trial counsel could have presented evidence and argued diminished capacity based on the brain surgery defendant previously underwent, as a separate mitigating factor. Clearly, defense counsel could have presented some testimony of defendant's character which would attempt to counter the picture painted by the prosecution.

5) the failure of defense counsel to request special jury instructions on the penalty phase which instructions would have cleared up the deficiencies in the standard instructions employed by the Court. For instance, under these instructions the jury is told that "it is your duty to follow the law which will now be given to you by the Court" (R-1914). The jury is then told the aggravating factors. followed by these instructions on mitigating circumstances: "The mitigating circumstances which you may consider, if established by the evidence are these. . ." Seven mitigating factors are read - no where is the jury told that they are not limited to those seven factors and trial counsel did nothing to enlighten the jury of that fact.

The total lack of understanding and lack of presentation by trial counsel during the penalty phase denied defendant his rights under the Sixth, Eighth, and Fourteenth amendments to the U.S. Constitution. When this portion of the trial is coupled with the ineffective assistance rendered to defendant during voir dire such a serious deficiency exists that the Court cannot conclude that the ultimate outcome of the trial was not affected. With a jury intentionally composed by the prosecutor to exclude all persons with death penalty scruples and a woefully inadequate presentation during the penalty phase, it is no wonder that the recommendation of death took less than 30 mintes.

Defendant was represented on mandatory appeal by one of his trial attorneys. Defendant was denied effective assistance of appellate counsel in that counsel did not include the following meritorious legal claims:

1) that the jury selection in this cause was contrary to the limitations and dictates of Witherspoon v. Illinois, for the reasons set out above.

2) that the arrest of defendant was in violation of his constitutional rights and required that the judgment and sentence be set aside.

3) that the defendant was denied a fair trial within the meaning of the Sixth Amendment based on the totality of rulings made during his trial and set out in point four above.

4) that the defendant was denied effective assistance of counsel in the trial stage.

5) that the penalty phase of the trial violated defendant's constitutional rights in that the trial court allowed the jury to consider only those mitigating factors set out in Ch. 921.141.

6) that the penalty phase of the trial violated defendant's constitutional rights in that the trial court instructed the jury using instructions which do not contain a complete and accurate statement of the law of capital punishment.

The omission of these arguably meritorious issues on appeal mandates a new appeal. There is no conceivable strategic reason for omitting meritorious claims from a capital appeal and effective counsel in this case would have raised these issues.

SIX

THE JUDGMENTS AND SENTENCES OF DEATH ARE CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The judgment and sentence of death in this case is contrary to the Eighth, and Fourteenth Amendments in that:

a) the trial court limited jury consideration of mitigating factors to those statutory factors contained in Chapter 921.141(6) in violation of the United States Constitution.

b) The imposition of the death penalty constitutes cruel and unusual punishment as applied to this defendant under the facts and circumstances of this case.

c) the construction and application to this defendant of the aggravating factors, "especially heinous, atrocious, and cruel by the Florida Supreme Court is so broad as to make its

d) the prosecutor was guilty of misconduct by arguing non-statutory aggravating factors.

The trial court improperly limited jury consideration of mitigating factors to those contained in the Jury Instructions and Chapter 921.141(6), Fla. Statute 1975.

In instructing the jury the court stated:

> "The mitigating circumstnaces which you may consider, if established by the evidence, are these:
> A. That the defendant has no significant history of prior criminal activity;
> B. That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance;
> C. That the victim was a participant in the defendant's conduct or consented to the act;
> D. That the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor;
> E. That the defendant acted under extreme duress or under the substantial domination of another person;
> F. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
> G. The age of the defendnat at the time of the crime." (R-1917, 1918)

The jury was never informed that they could and should consider any other aspect of the defendant's character or any other circumstance of the offense that was relevant.

In arguing to the jury during penalty phase the prosecutor argued that the mitigating factors contained in the statute were the only factors and that defendant did not qualify for any of them. As stated earlier, the defendant's trial counsel did nothing to correct this interpretation of the statute. Further, the trial Court's order in support of the death penalty limited consideration to only statutory aggravating and mitigating factors. Nevertheless, the limitation by the trial court to consideration of only statutory mitigating circumstances is contrary to the Eighth and Fourteenth Amendments. Subsequent to the trial of this cause, the United States Supreme Court in its decision in Lockett v. Ohio, 438 U.S. 586 (1978) held that the failure to allow relevant non-statutory mitigating circumstances in the

in the sentencing phase of a capital case violates the Eighth and Fourteenth Amendments. See Songer v. State, 365 So.2d 696 (Fla. 1978) It is clear that there were other non-statutory mitigating factors which could be argued as separate, distinct, mitigating factors. The disparity in punishment between Haskew and the defendant could have been set out and argued as a distinct, separate non-statutory mitigating factor; other positive character traits could have been set out as a distinct non-statutory mitigating factor.

It is submitted that the limitation of mitigating factors in any fashion is fundamental error and cannot be countenanced by the Eighth and Fourteenth Amendments of the U.S. Constitution. It is further submitted that the violation is so fundamental that the failure by trial counsel to object does not constitute a waiver.

The imposition of the death penalty constitutes cruel and unusual punishment as applied to this defendant under the facts and circumstances of this case.

The Court in Proffitt v. Florida, 428 U.S. 242 (1976) held that the death penalty does not constitute cruel and unusual punishment per se, and that the Florida Capital Penalty statute is constitutionally valid on its face. Conceding for arguments sake that the rule in Proffitt is correct, the defendant contends that the imposition and carrying out of the death penalty constitutes cruel and unusual punishment under the circumstances of this case. Proffitt does not foreclose the argument that the death penalty may be unconstitutional as applied to a given case

The basis of the argument is that the totality of the circumstances require a finding that the death penalty was not appropriate. The incredible disparity existing between the punishment given Ellis Marlow Haskew and the defendant cannot be accepted under any principle of constitution law. An honest unbiased reading of the record shows that in almost every point relied upon by the court to support the sentence of death, the same point would be applicable to Haskew. He too had a serious felony background and

he too was involved for pecuniary gain. In fact, the record shows that Haskew received a total of $7,000 - $8,000 from the defendant. Just as the defendant "recruited" Haskew, Haskew recruited the triggerman; just as the defendant had passed the money along to Haskew, Haskew passed it along to the triggerman; just as Antone gave the gun to Haskew, Haskew gave the gun to the triggerman; just as the defendant was aware that the murder was done to disrupt and hinder the enforcement of the laws so to did Haskew. Haskew was not a pawn of defendant's, and his participation is no less significant in the actual killing.

The disparity that exists between a sentence of 35 years with eligibility of parole at any time, and a sentence of death cannot be justified without some far greater disparity of actual culpability.

The construction of the aggravating factor "...especially, heinous, atrocious, and cruel" by the Florida Supreme Court is so broad as to make its application violative of the Eighth and Fourteenth Amendments.

The United States Supreme Court upheld the term "especially heinous, atrocious, and cruel" contained in §921.141 (5) (h) Fla. Stat. (1975) in Proffitt v. Florida, 428 U.S. 242 (1976) against a challenge of vagueness and overbreadth, but only because the then existing decisions of the Florida Supreme Court cured whatever constitutional defects may have existed in the term by construction. id at 254. The defendant submits that the construction placed upon the term by the Florida Courts in all of the death penalty cases decided in the years since Proffitt, has rendered the meaning of the term vague and overbroad.

The Florida Supreme Court rulings in Proffitt v. State, 315 So.2d 461 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Gibson v. State, 351 So.2d 948 (Fla. 1977); Cooper v. State, 336 So.2d 1133 (Fla. 1976); Kampff v. State, 374 So.2d 954 (Fla. 1979) indicate that there is no definite pattern to the manner in which this factor has been used. Judicial interpretation has not

succeeded in solidifying the definition of the term "especially heinous, atrocious, and cruel". It is submitted that the phrase has been rendered vague and overbroad by judicial construction. Since this factor supports the imposition of the death penalty in this case, the judgment and sentence must be vacated.

Further, the prosecutor was guilty of misconduct by arguing non-statutory aggravating factors. The import of the prosecutor's argument during the penalty phase is that this murder was not an accident, it was not a rage type killing, but in fact, was a cold, calculated, highly premeditated "murder for hire" (R 1898). The fact of premeditation, and the fact that the murder was cold and calculated are not properly arguable as aggravating factors. To set them up as such is to go outside the statutorily defined aggravating circumstances and is therefore contrary to the Eighth and Fourteenth Amendments.

CONCLUSION

The judgment and sentence of death entered in this case should be vacated.

Respectfully submitted,

ANTHONY ANTONE

TOM McCOUN, Attorney for Defendant

Sworn to and subscribed before me this 20 day of January, 1982, at Hillsborough County, Florida.

NOTARY PUBLIC
My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires Mar. 8, 1985

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by HAND to the Office of the Honorable Jim Smith, Attorney General, in the care of Charles Corses, Park Trammel Bldg., Suite 804, 1313 Tampa Street, Tampa, Florida 33602, this 20th day of January, 1982.

TOM McCOUN, ESQUIRE
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Attorney for Defendant

VI

PETITIONER'S JUDGMENT AND SENTENCE WERE ENTERED IN VIOLATION OF HIS FOURTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

The Petitioner's arrest in his home without a warrant was an unconstitutional infringement of Petitioner's Fourth Amendment Rights.[12/] The United States Supreme Court in Payton v. New York, 445 U.S. 373 (1980) held that "the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643; Wolf v. Colorado, 338 U.S. 25, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."

It is submitted that Petitioner's arrest was contrary to the law in Payton, supra, and that his judgment and sentence should be vacated. The Supreme Court, in no uncertain terms, are presumptively unreasonable and that "to be arrested in ones home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the

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12/ Factually, it has never been disputed that Petitioner's arrest at his home, in the nighttime, without an arrest warrant was a violation of the rule of Payton. It has been contended by Respondents that Payton should be given only prospective application and in any even that this Fourth Amendment issue is precluded under Stone v. Powell, ante.

home. This is too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when accompanied under statutory authority and when probable cause is clearly present."

It is further submitted that the law of Payton, supra, should be given retrospective application. In Stovall v. Denno, 388 U.S. 293 (1967); Linkletter v. Walker, 381 U.S. 618 (1965), the Court stated that in deciding whether a new rule of law should be retroactively applied the essential considerations are: "a) the purpose to be served by the new rule; b) the extent of reliance on the old rule; and c) the effect on the administration of justice of a retroactive application of the new rule." Applying these considerations to this case, it is submitted that the rule of Payton is so fundamental and its purpose so important, when compared to the minimal effects on the administration of justice that the Court should give it retroactive application.

Even if the Court decides the law in Payton, supra, would be given prospective application only, it would appear, using the definition applied in Linkletter, supra, for deciding when a decision is "final", that the decision in Petitioner's case was not "final"[13/] at the point in

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13 / "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for ceriorari had elapsed before our decision in Mapp v.Ohio "Linkletter, 85 S.Ct. at p.1734, cont'd.

in time when Payton was decided and therefore its application to Petitioner's case would in fact be prospective.

The District Court found that, on this Fourth Amendment issue, the Petitioner had received "a full and fair opportunity to litigate [the] claim in State courts" and therefore was precluded from raising it in a Petition for Habeas Relief. Stone v. Powell, 428 U.S. 465 (1976); Carver v. State, 537 F2d 1333 (5th Cir. 1976).

Petitioner concedes that Stone v. Powell, supra, does hold that where the State has provided an opportunity for full and fair hearing of the Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial. However, the question of whether there was an opportunity for full and fair hearing must be viewed in the context of Townsend v. Sain, 372 U.S. 293 (1963) see, Stone. Powell, supra, 428 U.S. at 494, 495, id. n.36; Graves v. Estelle, 556 F2d 743 (5th Cir. 1977)

Petitioner submits that there was not an opportunity for full and fair hearing on this Fourth Amendment issue. First, it is obvious the Petitioner was unaware of the law in Payton, (decided in 1980), since his trial occurred in 1976. Secondly, at the time of Petitioner's trial, it would have been futile to raise this particular objection, as state law allowed what was done in this case. State v. Perez, 277 So2d 778 (Fla. 1973). Consequently,

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13 /cont'd. n.5. Payton supra, was announced April 15, 1980. Petitioner's petition for ceriorari was still pending at that time wasn't denied until October 14, 1980.

although the Petitioner's counsel did challenge the Petitioner's arrest and did attempt to suppress Petitioner's post-arrest statements at the trial level, he did so on Fifth Amendment grounds only.

It is submitted that the failure to assert this claim was justifiable, as Petitioner was previously unable to assert his rights and certainly was unaware of the significance of the relevant facts. As the court noted in Townsend v. Sain, 372 U.S. 318 at p. 317:

> The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

Petitioner's opportunity for a full hearing should not be found to preclude habeas relief where, through no fault of Petitioner he is effectively precluded from receiving a determination, at that hearing, of the Fourth Amendment issue, because he is precluded from raising the issue by a state law which is latter overturned by a Federal case of significant and far reaching constitutional import. cf. Guice v. Fortenberry, 661 F2d 496, 506, 507.

Petitioner submits that the District Court's ruling denying Federal habeas corpus relief on this issue be reversed and remanded.

CONCLUSION

For all the reasons stated, this Court should reverse the order below dismissing Petitioner's habeas corpus petition and should grant habeas corpus relief, vacating the unconstitutional conviction and death sentence imposed upon him.

Respectfully submitted,

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(813) 896-2147
Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE

I, TOM McCOUN, hereby certify that on April 9, 1982, I served the foregoing Brief for Petitioner-Appellant on counsel for the respondents-appellees by depositing copies in the United States Mail, addresses as follows:

Charles Corces, Esquire
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Tampa, Florida 33601

TOM McCOUN, ESQUIRE
Attorney for Petitioner-Appellant

IN THE CRIMINAL JUSTICE DIVISION OF THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

THE STATE OF FLORIDA	:	
vs.	:	Case No. 76-1356
ANTHONY ANTONE	:	Division "D"
_____	:	

The trial of this cause continued before the Honorable Herboth S. Ryder, Circuit Judge, and a Jury, at the Hillsborough County Courthouse, Courtroom Number 2, Tampa, Florida, on Friday, August 27, 1976, as follows:

APPEARANCES:

Hon. Aaron K. Bowden, Assistant State Attorney, in behalf of the State;

Angelo Ferlita, Esquire and James Alfonso, Esquire, 601 East Twiggs Street, Tampa, Florida, in behalf of the defendant.

COPY

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For the State:		
#51, certified copy of defendant's file		940

PROCEEDINGS

(Court reconvened in Courtroom Number 2, County Courthouse, at 5:05 p.m. as follows):

THE COURT: All right. Is the State ready?

MR. BOWDEN: The State is, Your Honor.

THE COURT: Defense ready?

MR. ALFONSO: Defense is ready, Your Honor.

THE COURT: I have one question I would like to discuss with you prior to our continuing. Would you kindly approach the bench.

(There was a discussion off the record at bar.)

THE COURT: All right. Bring in the jury.

(The jury panel returns to the courtroom at 5:09 p.m.)

THE COURT: All right. Ladies and gentlemen of the jury, you have found the defendant guilty of murder in the first degree, and the punishment for this crime is either death or life imprisonment. The final

decision, however, as to what punishment shall be imposed rests solely with the Judge of this Court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

The State and the defendant may now present evidence relative to what sentence you should recommend to the Court. You are instructed that this evidence is presented in order that you might determine, first, whether or not sufficient aggravating circumstances exist which would justify the imposition of the death penalty and, second, whether there are mitigating circumstances, if any.

At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and in mitigation which you may consider.

You may begin, counsel.

MR. BOWDEN: Thank you, Your Honor. May it please the Court, the State offers into evidence as part of its aggravation, a

certified copy of the file pertaining to this defendant from the Department of Offender Rehabilitation of the State of Florida.

THE COURT: Very well. Any objection?

MR. ALFONSO: None, Your Honor.

THE COURT: None? All right. Let it be received in evidence.

MR. BOWDEN: Your Honor, that is the only evidence which the State, additional evidence, I should say, the State will present in aggravation.

THE COURT: All right. Defense?

MR. ALFONSO: Your Honor, the defense intends to put on no evidence in mitigation other than the exhibit which the State has introduced.

THE COURT: It is my understanding that you both are stipulating that it be introduced into evidence inasmuch as you each feel, you, of course, feel there are sufficient aggravating circumstances contained in that file and then you, gentlemen, the defense, feel there are some mitigating circumstances to be considered by the jury in that file as well, correct?

MR. ALFONSO: That's correct, sir.

THE COURT: Then you rest?

MR. BOWDEN: Yes, sir.

THE COURT: And you rest; is that right?

MR. ALFONSO: That's correct, sir.

THE COURT: Then you may make your closing arguments.

MR. BOWDEN: Thank you, Your Honor.

Ladies and gentlemen, this is a quite different procedure, for obvious reasons, from that which we have been through before. On behalf of the State of Florida, you have rendered a verdict, the State of Florida being the plaintiff given relief for the accusations made against this man by the Hillsborough County Grand Jury. Although your recommendation is not binding on the Court, it obviously is a consideration of extreme importance.

As a representative of the State of Florida, of course, I have the duty to represent the State, what I consider to be the interest of the State of Florida collectively, and I assure you that it is not something that I take lightly in standing

before you requesting a certain type of disposition in a capital case. It is real. You know the inevitable punishment is real, but I wish to state to you categorically at the outset that the State wishes to persuade you that this defendant should be electrocuted for the crime of which you have found him guilty.

Now, you are entitled to accept, I mean, consider, weigh and evaluate all of the evidence that you heard at the trial and, in addition, the exhibit which we have just entered into evidence. You will be guided by the law in determining aggravation and mitigation.

I would like to go through those factors with you one by one and discuss them and hopefully persuade you to the State's point of view.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence. Some of them don't apply, and we will go through those, too.

One. That the crime for which the

defendant was convicted was committed while the defendant was under sentence of imprisonment. That doesn't apply in this case. That is not an aggravating factor.

Two. That at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense. That is not the case here, or of a felony involving the use or threat of violence to some person.

In this file you will see that this defendant has been convicted twice of robbery to which he has been committed to prison. The Court will instruct you as a matter of law that robbery is a felony and, furthermore, that an essential element of the crime of robbery is the use or threat of force or violence to the body or person of another human being.

Aggravating factor Number one.

Three. That the defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons. Not applicable.

Four. That the crime for which the

defendant is to be sentenced was committed while the defendant was engaged in or an accomplice in the commission of, and it enumerates some crimes, such as robbery, arson, burglary, and so forth, which does not apply here.

That the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. Not applicable.

That the crime for which the defendant is to be sentenced was committed for pecuniary gain. Glaringly applicable, contract murder, pecuniary gain, aggravating factor number two.

Next, that the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws. Glaringly applicable. A police officer executed because of his official position. Aggravating factor number three.

Next. That the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. "Heinous"

meaning extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain or utter indifference to, or enjoyment of, the suffering of others or pitiless.

Does this crime not fit those definitions, pitiless, cruel, vicious, wicked, vile, shockingly evil? Aggravating factor number four.

Then, you should consider the mitigating factors, and I submit to you that the lack of the existence of the mitigating factors enters into it. Mitigating factor, mitigating, now, number one: That the defendant has no significant history of prior criminal activity. This defendant has twice been committed to penal institutions in this State for the very serious crime of robbery. "Robbery" is the taking of property from another person by the use or threat by force, violence, or intimidation. Twice the defendant has a significant history of criminal activity. That mitigating factor does not apply in this case.

Mitigating Factor B: That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance. Never. There has been no showing whatsoever, no suggestion, that at any time this defendant, at the time he ordered the execution of Richard Cloud, was under the influence of extreme mental or emotional disturbance. Mitigating Factor "B" or "2" does not apply.

Mitigating Factor 3: That the victim was a participant in the defendant's conduct or consented to the act. Clearly, clearly not the case. Richard Cloud did not participate or consent.

Next factor: That the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the defendant's participation was relatively minor. No. While this defendant did not actually, physically, go and gun down Officer Cloud, he did arrange for the execution. He furnished the weapon. He furnished the money that

caused others to go out and murder. I submit that his participation was substantial.

Next. That the defendant acted under extreme duress or under the substantial domination of another person. No. That mitigating factor does not apply. He was the leader. He directed the activities. He obtained the weapon. He furnished the money. He put pressure on to go out and do him in because the boys want him out of the way.

Next. The capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired. No. There has been no showing that the mental or emotional, physical ability of this defendant was diminished in any way such that he was unable to conform his conduct to the essential requirements of the law. To the contrary. The evidence is that he knowingly, willfully, willfully entered into an agreement, a conspiracy, a combination to murder.

Last mitigating factor: The age of the defendant at the time of the crime. It is not a factor. The purpose of that is that

if a person is extremely youthful, sixteen, seventeen, eighteen years old, that you consider that, his age. This is a mature man in his fifties who was able to appreciate the requirements of the law.

Those are the only mitigating factors under the statute.

This defendant does not qualify for one mitigating factor, not one. He qualifies under four of the statutory aggravating factors.

I'm going to be brief because you have heard the evidence. You know the horror. You know what happened at 404 West Alva Street. What can be worse than killing someone who is enforcing the law? Dick Cloud must have been some kind of tough cop that they wanted him out so bad, that they would enter into a contract to get him out of the way. He must have been some kind of cop. He was a man that was sworn to enforce the laws of the State of Florida and the law of this community.

He was a man who was formerly Detective Sergeant with the Tampa Police Department.

He was a man whose duty was to protect law abiding citizens of this community. The evidence is that because Richard Cloud was going to give Grand Jury testimony, because Richard Cloud was going to, or was putting pressure on the criminal activities of Victor Acosta, that he was putting heat on the crooks, that he had to go. And the boys, Victor, Anthony Antone and the others unknown, put out the word. He's got to go, things are coming up, whatever, let's get on with it.

It boggles the mind. It simply boggles the mind to try to understand how someone can sit down and talk about killing another human being.

It boggles the mind as to how this defendant could sit down and parcel out money and divvy-up money and give them the weapon and the picture and the address and the identification and coolly sit back and say, however he said it, get him because the boys want him done away with. That boggles my mind.

Now, you can sit back and you can say,

well, okay. What are we going to do?

When you think of the death penalty, you think of it as something real and it should only be imposed in unusual cases as required by law. But everytime you think of the electricity passing through the body of this defendant, I ask you to think of the body of Richard Cloud who no longer lives because of this defendant.

I know that it isn't something that is comfortable to contemplate nor is it comfortable to contemplate the fact of Richard Cloud's death and the way that he died. We can understand accidents and misfortunes. We can understand the rage type of killings, but who can understand murder for hire? Is there any greater crime anywhere than that?

Ladies and gentlemen, the State of Florida asks you to recommend to this Court that this defendant be taken to a proper state institution and ask that you recommend to this Court that he be kept at that institution until a warrant from the Governor is issued for his execution.

We ask that you recommend to this Court by a majority of your members that he be held at that institution and on the appointed day of his execution, that the proper state official cause sufficient voltage to pass through his body until he is dead.

Thank you.

THE COURT: All right.

MR. ALFONSO: Good afternoon, ladies and gentlemen. Obviously, this will be the last time I or any of the other attorneys will have an opportunity to address you; and, certainly, shortly you will embark on your last function in this cause or this trial.

The State has obviously just gone over with you the various statutory aggravating and mitigating circumstances which our legislature has set forth in our statutes for consideration by the jury such as yourself who has, in fact, found a defendant guilty of murder in the first degree.

What you have been subjected to is the State's interpretation of the evidence as applied to the enumerated aggravating and mitigating circumstances.

Obviously, I am here to suggest to you or to advocate on behalf of Mr. Antone that there is another side to this.

Taking them one at a time in the fashion that the State did, I again would concur with the State on the first aggravating circumstance in that it is not applicable, that is, that the crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment. This obviously is not applicable.

B. That at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense. Obviously not applicable, or of a felony involving the use or threat of violence to some person.

The State here would make much hay or much weight of two robbery convictions which occurred on or about the same time. The convictions, I believe, as will be borne out by the exhibit which has been stipulated into evidence, will reflect that they occurred back in 1965 and 1966 and they were out of Dade County, I believe.

The defendant was in the state prison system on both of these convictions at the same time. I would suggest to you that these are the only two convictions in Mr. Antone's lifetime prior to today and they were and are obviously some time ago. The convictions were ten years ago. I believe there was testimony during the trial that Mr. Antone would have completed his parole May 11th, 1976.

I think the file would reflect that while in prison, he was not a disciplinary problem. At one time or another he was assigned to a trusty ward. He, in fact, was a candidate for parole and did, in fact, get paroled.

I don't really think that you can characterize the defendant's past record as a strong aggravating circumstance. Certainly, the fact that the paragraph that we are referring to refers back to convictions, it is significant, but I don't think, in light of the circumstances, applicable to Mr. Antone. It's the type of thing the State can point to as a strong aggravating circumstance which should condemn him in the electric chair.

I don't think this is what our legislature had in mind but it is up to you to interpret it.

C. That the defendant in committing the crime for which he is to be sentenced knowingly created a great risk of death to many persons. Obviously, this is not so. The State concedes it's not applicable and I think you only have to recall the testimony of Mr. Haskew and Mr. Gilford, excuse me, the testimony of Mr. Haskew, referring to when he and Gilford drove by on at least two occasions. The first time another car was there, obviously meaning other people were there, and so they kept going. They waited until they believed he was alone. It was an attempt on their part to isolate the victim.

That the crime for which the defendant is to be sentenced was committed while the defendant was engaged or was an accomplice of and attempted to commit arson, burglary, kidnapping, et cetera, certain enumerated felonies. The State concedes this is not applicable and I wholeheartedly concur.

Obviously, the next aggravating circum-

stance is also not applicable in that it reflects that the homicide was committed for the purpose of effecting an escape or something of this nature and this obviously is not applicable.

The only real aggravating circumstance that I can see is "F," and that is that the crime for which the defendant is to be sentenced was committed for pecuniary gain, and I think even this one bears explanation. I think it needs to be differentiated from the type of situation where you walk into a bank and kill everyone and take the money, this sort of thing, or you kill a man to take his wallet, that sort of thing. I think that is what the legislature speaks of here.

Although obviously the State's theory in this case is that it was greed that motivated the desire for pecuniary gain, I don't think that is here if you believe the State's theory. It's not for money that this was done if you believe the State's theory.

The rationale, the motive -- Haskew testified from the stand. Somebody wanted

him killed because he was going to testify or something like this. The State, in their summation, made a big issue of this so I think you can discount that factor, which takes us down to the next one which the State says was an aggravating circumstance.

That the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

Well, what is very interesting here is that in the whole State's theory is that it comes from Haskew, who is at least two parties removed from the supposed figure who ordered the execution, which would be, I believe, Victor Acosta, if my memory serves me correctly.

The State, in all of its arguments, has cried out for justice but never once did the State come out and tell you that at the time Richard Cloud was killed he was no longer a police officer. Recall if you ever heard the State testify to that.

So, what does it have to do with the

enforcement of laws at the time he was killed? He was not a police officer.

The State would then point to the last aggravating circumstance: That the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. When you consider this paragraph, consider what the legislature was doing. They are talking about first-degree murder. Obviously, a person is convicted of murder to get to this stage. Obviously, to a certain extent, every murder can be characterized as heinous, cruel, atrocious, wicked, vile, any of the definitions we set out here.

But the legislature is telling us some murders are more atrocious, more heinous, more cruel than others. They are telling you to distinguish.

I suggest that what the legislature is pointing at here and directing you to consider are situations where there is torture, this type of thing, mutilation, a prolonged, torturous situation. That is the type of aggravating circumstance that the legislature speaks of. It is very easy to

get up here and say every murder is atrocious. Obviously, it is. The legislature is asking you to distinguish.

Your function now, obviously, is to determine whether or not Mr. Antone will serve the next twenty-five years of his life in prison, that is, if he gets life, or to recommend life, that is, to the Judge, or whether you will recommend death.

Now, don't be surprised because I say twenty-five years. You heard Marlow Haskew, and he is going to be sentenced or agreed to plea and has pled in exchange for a sentence, to be sentenced to thirty-five years, and you are saying Haskew gets thirty-five and if he gets life, he gets twenty-five. It doesn't work that way.

Numerically it would sound like Mr. Antone is getting a better deal. Twenty-five years on a first-degree murder, that is, life on a first-degree murder means a minimum, a minimum of twenty-five years, with no opportunity for parole.

That means he will serve three hundred sixty-five days twenty-five times. That's

what life means, first-degree murder. Absolutely no opportunity for parole, day for day, twenty-five years.

Let's review the mitigating circumstances. I think I have covered it in talking about the corresponding, the first one, anyway, that the defendant has no significant history of prior criminal activity. I think I've covered that in covering the corresponding aggravating circumstances, that is, that he had a prior record. I would suggest to you that the key here is "significant history of prior criminal activity." We are talking about two convictions ten years ago at the same time and in an entire lifetime.

B. That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance. I concur with the State. That is not applicable.

C. That the victim was a participant in the defendant's conduct or consented to the act. Again, I concur with the State,

not applicable.

D. That the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor. Very applicable. How can the State stand here before you, all week long, knowing that Haskew has pled to second-degree murder for thirty-five years, which means he is eligible for parole. Mr. Haskew, I believe, stated seven or eight years, and I believe on the witness stand Mr. Bowden suggested or asked the question to Mr. Haskew: Isn't it true, sir, all you did was drive the car?

Justice is what the State would have you believe they are seeking. Isn't it true, sir, all you did was drive the car? But yet, on the other hand, they are asking death for Mr. Antone who didn't pull the trigger either, who didn't originate the idea either. To find him guilty, you have to put him on a scale equivalent to Haskew. It starts up here, if you believe the State's theory, with Mr. Acosta, or some of his superiors, if you

believe they are some type of organization, and moves down, ultimately, to Gilford. A conduit. We have several conduits, several stages.

How the State can authorize a deal with one level, or one person on one level, for thirty-five years, and then ask death for a person on an equivalent level, I think, is amazing, but they will tell you that they are seeking justice.

All along you have heard the State and you have heard the instruction: accomplice, accomplice, accomplice. Well, here it is in the mitigating factors and I suggest to you that it is a strong one.

Mr. Antone was not even present. When it came right down to the last minute, when it was going to happen, Haskew had an opportunity to prevent it. He was the last person here today that had the opportunity to prevent this offense but didn't.

The next mitigating circumstance is that the defendant acted under extreme duress or under the substantial domination of another person. The State urged this is not applic-

able. We concur.

The next circumstance: The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired. I think what they are suggesting here is insanity. The State has urged that this is not applicable and we concur.

The last mitigating circumstance is the age of the defendant at the time of the crime. Mr. Antone will be fifty-eight years this December 9th. He was born December 9, 1917. In twenty-five years he will be eighty-two years old. Think of that in relation to the function of the death penalty. What is it made to do? What is the idea? What is the rationale?

I suggest to you that the rationale or the function of the death penalty is to permanently remove an individual from our society who is incapable of rehabilitation or incapable of mending his ways or conforming his actions and activity to acceptable community standards. Isn't that the real function of the death penalty?

If the person has demonstrated by his activity, by his actions, that he can't function properly in our society, we have got to remove him permanently.

Weigh that function in relation to Mr. Antone's age. I suggest to you that twenty-five years in prison -- and I am not suggesting to you at the end of the twenty-fifth year he walks out. It's at that time he then becomes eligible for parole. He may never walk out, assuming he lived that long.

Understand that. Twenty-five years is the minimum. There is no cap. There is no ceiling.

And when you consider that in relation to his health, I think that life, that is, a recommendation of life, would have the same function as the death penalty. You would have permanently removed Mr. Antone from society.

I ask you to review the exhibit which has been admitted in its entirety. In there there is a substantial medical history of the injuries Mr. Antone received while he was in prison, from the '66 conviction, and I

think you will be able to gather the gravity and the seriousness of his injury, the type of debilitating injury he received in prison. He was struck in the head with a ball peen hammer. The details are in there and they are certainly quite gruesome and I suggest to you to read them, and I suggest to you it is your duty to become acquainted with the exhibit as a juror.

I think his health is a matter of record in there and it is a factor to be considered by you in considering the mitigating factor of age.

I don't see anywhere in this rule here or this paragraph referring to age where it's pertaining to youthful offenders as opposed to aged offenders. If you see it, then you disregard what I have told you, about him being fifty-eight in December.

Aside from the factors that I've covered with you today, I would strongly suggest to you that the death penalty in our State, because of the punishment that life imprisonment carries with it, no longer has a realistic function. It is almost senseless

and barbaric, particularly in this case. Especially when you think of it in this term. What the State is asking you to do is take a life, which is the very thing for which you have just condemned Mr. Antone. The only difference is the reason. You think about that.

I suggest to you to sentence Mr. Antone to death or to recommend death would be nothing more than revenge and certainly would not be justice.

In conclusion, I would suggest to you and I ask you to listen to the Court's instructions, that the State must prove its aggravating circumstances beyond and to the exclusion of every reasonable doubt, just as they did have to prove the guilt of Mr. Antone. And you have to consider here the totality of the circumstances. You have got to balance the aggravating and the mitigating, the circumstances that are applicable to this case, this defendant.

And I strongly suggest to you that when you consider the totality of the circumstances, that your ultimate conclusion would be that

they dictate to you a recommendation of life.

Thank you.

THE COURT: All right. Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law which will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your verdict should be based upon the evidence which has been presented to you in these proceedings.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:

A. That the crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment;

B. That at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense or of a felony involving the use of violence to some person.

The Court instructs you that the crime of robbery is a felony involving the use or threat of violence to another person.

C. That the defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons;

D. That the crime for which the defendant is to be sentenced was committed while the defendant was engaged in the commission of any robbery, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

E. That the crime for which the defendant is to be sentenced was committed for

the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

F. That the crime for which the defendant is to be sentenced was committed for pecuniary gain;

G. That the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

H. That the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

Now, "heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.

If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence of life imprisonment.

Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

The mitigating circumstances which you may consider, if established by the evidence, are these:

A. That the defendant has no significant history of prior criminal activity;

B. That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance;

C. That the victim was a participant in the defendant's conduct or consented to the act;

D. That the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor;

E. That the defendant acted under extreme duress or under the substantial

domination of another person;

F. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

G. The age of the defendant at the time of the crime.

Aggravating circumstances must be established beyond a reasonable doubt before they can be considered by you in arriving at your decision. Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt.

Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense should be wholly disregarded.

If one or more aggravating circumstances

are established you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as it is given to you by the Court.

Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist.

Based on these considerations, you should advise the Court whether the defendant should be sentenced to life imprisonment or to death.

In these proceedings it is not necessary that the verdict of the jury be unanimous, but a verdict may be rendered upon the finding of a majority of the jury.

The fact that the determination of

whether or not a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment upon the sole issue which is submitted to you at this time: Whether a majority of your number recommend that the defendant be sentenced to death or to life in prison.

Now, should a majority of the jury determine that the defendant should be sentenced to death, you should recommend an advisory sentence as follows:

A majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, Anthony Antone.

On the other hand, if, after considering all the law and the evidence touching upon the issue of punishment, a majority of the

jury determine that the defendant should not be sentenced to death, then you should render an advisory sentence as follows:

A majority of the jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the defendant, Anthony Antone.

The law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment.

There has been prepared for your use a form of recommendation by the clerk who just handed it to me before I came on the bench and, again, the order or anything I say has no meaning, no significance, whatsoever, as to how I feel.

The first one, of course, is:

"Tampa, Florida, August 27, 1976. A majority of the jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the defendant, Anthony Antone." Again, as in the verdict forms, there is a line. Underneath that line is the word "foreman." If that's your

recommendation, your foreman would sign there.

The other one is: "Tampa, Florida, August 27, 1976. A majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, Anthony Antone." A line on the bottom right-hand side. Underneath that is the word "foreman." If that is your recommendation, your foreman would sign that, above that line.

Now, you will now retire to consider your recommendation and when seven or more of you are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to Court.

I am giving the two forms of recommendation to the bailiff who will now escort you out into the jury room where you can begin your deliberations. When you have reached that recommendation, notify the bailiff and we will return you to Court.

(The jury panel retires to consider its recommendation at 6:02 p.m.)

THE COURT: The record should also reflect that I have given them the exhibit that was admitted into evidence by stipulation.

THE CLERK: That was Exhibit Number 51.

THE COURT: All right. Then we stand in recess awaiting their recommendation.

(There was a recess.)

THE COURT: State ready?

MR. BOWDEN: Yes, sir.

THE COURT: Defense ready?

MR. ALFONSO: We are, Your Honor.

THE COURT: All right. Bring in the jury.

(The jury panel returns to the courtroom at 6:26 p.m.)

THE COURT: All right. Mr. Foreman, has the jury reached their recommendation?

THE FOREMAN: Yes, they have, Your Honor.

THE COURT: All right. Pass it to the bailiff and to the clerk for inspection, please.

All right. Stand, Mr. Antone. Publish the recommendation, please.

THE CLERK: "Tampa, Florida, August 27, 1976. A majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, Anthony Antone. Tom Barton Smith, Foreman."

THE COURT: Let me have it, please. You may be seated, Mr. Antone.

(The jury was polled.)

THE COURT: All right. Very well. Then, ladies and gentlemen of the jury, your service has been completed and I do now discharge you. Take them into the jury room, please.

(The jury panel leaves the courtroom at 6:30 p.m.)

THE COURT: All right. Then, ladies and gentlemen, we will be in recess for a sufficient amount of time for me to make up my mind.

THE BAILIFF: Court will be in a temporary recess.

(There was a short recess.)

THE COURT: Come forward, Mr. Antone. You are Anthony Antone?

THE DEFENDANT: Yes, sir.

THE COURT: And you have been found guilty by a jury of the crime of murder in the first degree as contained in Indictment 76-1356, Division "D" In a separate proceeding to consider the penalty, a jury rejected the possibility of rehabilitation and recommended to the Court that it impose the death penalty.

Do you or does anyone in your behalf have anything to say before the judgment and sentence of this Court is passed?

MR. FERLITA: Your Honor, we would respectfully request that the Court consider ordering a presentence investigation prior to passing sentence.

THE COURT: Anyone else have anything to say?

You, Mr. Antone?

THE DEFENDANT: No, sir.

THE COURT: Anthony Antone, the Court having given you the opportunity to show cause why the judgment and sentence of this Court should not be passed, and no cause having been shown, the Court does hereby adjudicate you, Anthony Antone, guilty of

the crime of murder in the first degree as contained in Indictment Number 76-1356, Division "D" with the recommendation of death.

It is the judgment and sentence of this Court that you, Anthony Antone, be transported by the Sheriff of Hillsborough County to the Superintendent of the Florida State Prison and into the custody of the Department of Offender Rehabilitation to await the death warrant.

You are to be confined as the Superintendent of the Florida State Prison shall direct within the walls of the permanent death chamber, pending execution by the passage through your body of a current of electricity of sufficient intensity to cause death as provided under the laws of the State of Florida.

I now advise you that it is your right to appeal within thirty days from the date of the proceeding had in this Court.

You are further advised that you are entitled to the assistance of counsel in the filing and preparation of your appeal, upon

your request, and a showing that you are entitled to an attorney at the expense of the State, the Court will appoint one for you.

These proceedings are at an end. We stand adjourned.

(Recess at 6:54 p.m.)

CERTIFICATE OF REPORTER

COUNTY OF HILLSBOROUGH)
SS
STATE OF FLORIDA)

I, JOSEPH A. MILLIKAN, CSR, Official Court Reporter for the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida,

DO HEREBY CERTIFY that I was authorized to and did report in shorthand the proceedings and evidence in the hereinbefore-styled cause, as stated in the caption hereto, and that the foregoing transcript constitutes a true and correct transcription of my shorthand report of said proceedings and evidence.

I FURTHER CERTIFY that I am not employed by or related to the parties to this matter nor interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal in the City of Tampa, County of Hillsborough, State of Florida, this 30th day of October, 1976.

Joseph A. Millikan

Joseph A. Millikan, CSR
Official Court Reporter

Transcribed from Stenotype by
Beverly A. Englar, Notereader

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA	)	
vs.	)	Case No. 76-1356
ANTHONY ANTONE	)	Division "D"
	)	

FILED
1976 SEP 2 PM 2 06

COURT'S FINDING OF FACT
IN SUPPORT OF DEATH PENALTY

IN THIS CASE, the Court has carefully considered and reviewed the testimony, evidence and finding by the jury of guilt of Murder in the First Degree, together with the evidence and testimony submitted by the State and Defense at the supplemental proceeding and the Jury's recommendation of the imposition of the Death Penalty and in consideration thereof makes the following findings of fact:

AS TO AGGRAVATING CIRCUMSTANCES:

1. That the Defendant, ANTHONY ANTONE, had been convicted of two Armed Robberies and was sentenced to prison for both crimes and that both these Robberies are felonies involving the use or threat of violence to another person.

2. That the First Degree Murder of Detective Sergeant Richard L. Cloud was plotted, planned, cooly, in a calculating manner, by the Defendant, ANTHONY ANTONE, and that the murder was committed for pecuniary gain, a contract murder.

3. The testimony of ELLIS MARLOWE HASKEW clearly showed that the Defendant ordered the execution of Detective Sgt. Richard L. Cloud, to disrupt and hinder the enforcement of laws. As the testimony of HASKEW shows, Defendant ANTONE related that he (Antone)

was getting"heat" from Vic Acosta and the boys to get rid of Cloud now because Detective Sgt. Cloud was to testify before a Grand Jury regarding certain elements of the Acosta organization.

4. The premeditated murder of Detective Sgt. Cloud was particularly a heinous, cruel and vicious crime.

5. That the Defendant ANTONE participated and planned the premeditated murder of Detective Sgt. Cloud, obtaining a .32 calibre pistol which was to be the murder weapon and furnished it to the men he hired to actually carry out the shooting. Defendant ANTONE actually constructed a silencing device manufactured in such a manner as to diminish the sound of the shots and to camouflage the gun from the public view. Defendant ANTONE actually recruited two people that would do his will, hired them for the contract murder of Detective Sgt. Cloud and provided them with a photograph of Cloud, a photograph of Cloud's home; gave them a description of his automobile and a description and location of his home and personally visited the home under a ruse prior to the murder to personally "case" the scene. Defendant ANTONE after contracting for the murder of Detective Sgt. Cloud, urged, cajoled and prompted his hired assassins into a more quick kill. He provided them with monies from his employer as well as his own personal funds for this murder and utilized his home as a nest from which to further and carry out plans of this contract assassination.

AS TO MITIGATING CIRCUMSTANCES:

1. Under paragraph (a) of the Instructions relating to Mitigating Circumstances, I find that paragraph (a) is not applicable to Defendant ANTONE as he has a highly significant history of prior criminal activity.

2. Paragraph (b) is not mitigating in that he was not under the influence of extreme mental or emotional disturbance but, in

fact, he is a cold, callous criminal, and testified under oath that he was in better physical condition at the time of the plotting and carrying out of this contract killing than he was at the time of trial.

As to paragraph (c), there was not even the slightest scintilla of evidence from which one could infer that the victim, Detective Sgt. Cloud, was a participant or consented to his own murder. In fact, there was evidence, however, from which one can infer that Detective Sgt. Cloud fought back at the time he was gunned down by throwing at the trigger man a large heavy metal ashtray, Sgt. Cloud's only weapon at hand.

As to paragraph (d), this mitigating circumstance is not applicable because although he was, in fact an accomplice, he was a principle to the murder, to the originating idea of the assassination, the premeditated murder of Sgt. Cloud, to the entire act and was, in fact, the most major and by far the dominant participant, the master criminal mind and mover of the entire plan and sorted act.

As to paragraph (e), again, this paragraph is not applicable in that there was not the breath of the idea that he acted under extreme duress or was under the substantial dominance of another person; on the contrary, there was an absence of extreme duress. Here, there was only an atmosphere of a cooly, calculated and considered time schedule and it was he, the Defendant ANTONE, that planned the act, that hired the gunmen; it was ANTONE who directed and instructed and schooled the gunmen over whom he (Antone) had absolute dominion.

As to (f), this paragraph is also inapplicable in that all the testimony in the trial to which this paragraph is applicable shows the Defendant had been in a position to appreciate the

criminality of his conduct and to conform his conduct to the requirements of law without impairment if he had desired to conform to the ways of civilized people but he made a conscious, voluntary, thoughtful decision to plan and to carry out this premedicated paid murder.

And certainly as to paragraph (g), the age of the Defendant at the time of the crime, some 58 years, militates against him. Here is a man of mature years not of tender age where one might conceive one's judgment might be impaired. Here ANTONE decided to take another man's life with ample time for reflection, consideration and study, thus, his age is, therefore, not a mitigating circumstance.

This Court is not unaware of the decision arising out of Orlando where a co-defendant received a sentence pursuant to a plea bargained agreement and that his co-defendant was sentenced to death. The Supreme Court reversed indicating, in substance, to order one's co-defendant to death when he was no more guilty than the one who had received the plea bargained lesser sentence was not equal justice under the law.

I do not believe it can be fairly argued that the culpability of Defendant ANTONE'S co-defendant, HASKEW, who gave testimony against ANTONE, is the same as that of ANTONE. HASKEW was merely an instrument of ANTONE. He was a hireling. He was the "wheel man" who really only drove the getaway car. The Court recognizes that HASKEW'S participation in this heinous, sorted and grotesque murder makes him a principle, but ANTONE'S culpability is far above that of HASKEW. ANTONE was the mover, the plotter, the master mind, the motivating force behind this cooly calculated contract killing. If ever there was a case in the annals of American Jurisprudence that met so well the need and the reason behind capital punishment, it is the acts of ANTHONY ANTONE.

Defendant ANTONE was the grand architect of the murder of Detective Sgt. Richard L. Cloud; HASKEW was a mere pawn. Therefore, I find that the two cases are extremely dissimilar.

THEREFORE, it is the Opinion and Determination of the Court, and, the Court so finds, that the Aggravating Circumstances outweigh the Mitigating Circumstances in this cause, that the Defendant ANTHONY ANTONE, wilfully, deliberately, maliciously, cooly plotted and planned the premeditated murder of Detective Sgt. Richard L. Cloud without justification or excuse, knowing full well the seriousness and the ultimate consequences of his actions. Thus, the Court finds the jury's recommendation of the Death Penalty to be appropriate in the case of Defendant ANTHONY ANTONE and, because of all the foregoing reasons, the Court is led to but one conclusion which is Defendant ANTHONY ANTONE has been and would continue to be a danger and menace to society and, therefore, must pay the ultimate penalty, death by electrocution, as provided by the laws of the State of Florida.

DATED and Filed in this cause this 27th day of August, 1976.

Herbert S. Ryder

CIRCUIT JUDGE

3.) The construction of the aggravating factor "especially heinous, atrocious, and cruel" by the Florida Supreme Court is so broad as to make its application violative of the Eighth and Fourteenth Amendments.

Chapter 921.141 Florida Statute 1975 contains Florida's statutory death penalty provisions. Included among the aggravating factors which may be considered by the jury is 921.141 (5)(h), " the capital felony was especially heinous, atrocious, or cruel."

Although the United States Supreme Court upheld the term "especially heinous, atrocious, and cruel" in Proffitt v. Florida, 428 U.S. 242 (1976) against the challenge of vagueness and overbreadth, it did so only because the existing decisions of the Florida Supreme Court cured whatever constitutional defects existed in the terms by judicial construction. Proffitt id. at 255, 256; "We cannot say that the provision, as so construed provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. Citing Gregg v. Georgia, 428 U.S. at 200-203. It is submitted by Petitioner

that the Courts faith in the Florida Supreme Court's ability to construe the provision so as to provide the guidance necessary to avoid arbitrary results was misplaced. The construction placed upon the term by the Florida Court in the those cases decided prior to and since Proffitt has rendered the meaning of the term vague and overbroad.

To illustrate, in Proffitt v. State, 315 So2d 461 (Fla. 1975) the Court upheld the finding that the crime was heinous, atrocious, and cruel where the victim was stabbed by a burglar in the chest by a butcher knife while laying in bed with his wife. In Swan v. State, 322 So2d 485 (Fla. 1975), the victim was beaten and left to die on the floor of her home by burglars or robbers. The trial court found the murder was "outrageously wicked, vile, atrocious, cruel and heinous" id. at 489, however, the Florida Supreme Court reversed the sentence of death. In Halliwell v. State, 323 So2d 557 (Fla. 1975) the victim was killed by a breaker bar and his body was dismembered by the defendant and left in different places in the city. Defendant had used a saw, machete, and breaker bar in the murder. The trial court found the crime to have been committed in "an extremely heinous, atrocious and cruel manner". id. at 561. The Florida Supreme Court however found "nothing more shocking in the actual killing than in a majority of murder cases." In Gibson v. State, 351 So2d 948 (Fla. 1977) the victim was shot twice in the head during a robbery. The trial

court found the crime heinous, atrocious, and cruel. The Florida Supreme Court upheld the sentence of death. In Cooper v. State, 336 So2d 1133 (Fla. 1976), the defendant and a co-defendant robbed a store and fled the scene. While fleeing they were stopped by a police officer. One of the two then shot the officer twice in the head. The trial court found the murder, "especially heinous, atrocious, and cruel". The Florida Supreme Court disagreed and ruled it was not heinous. In Fleming v. State, 374 So2d 954 (Fla. 1979) the victim, a police officer was shot once and killed during a struggle with defendant who was attempting to flee from a robbery attempt. The trial judge found the murder heinous, atrocious, and cruel, the Florida Supreme Court reversed the trial court on this point.

These cases indicate that no definite patterns exists to the manner in which this factor has been used or is to be used.

It is submitted that if either the statutory standards or the instructions used in individual cases are "so vague that they . . . fail adequately to channel the sentencing decision. . . of juries " the resulting sentence violates the Eighth Amendment. Gregg v. Georgia, supra, 428 U.S. 153, 195 n.46. In Furman v. Georgia, supra, 408 U.S. 238 (1972) the Supreme Court forbade giving standardless sentencing power to juries in capital cases. In Gregg, supra, at 189, 193 the Court reiterated that "where discretion is afforded a sentencing body on a matter so grave as the

determination of whether a human life should be taken or spared." and particularly where a jury is involved, " that discretion must be suitably directed and limited" by "careful instructions" so as " to minimize the risk of wholly arbitrary and capricious action."

In Petitioner's case, it was specifically argued by the prosecutor that Petitioner's crime was especially heinous, atrocious, and cruel. (R1905) The trial court instructed the jury on this aggravating factor (R1916) and subsequently relied upon it to support the sentence of death. See Antone v. State, supra, 382 So2d 1205, 1216,

This provision of Florida's death penalty scheme can no longer be sustained against an Eighth Amendment attack as so construed, it no longer provides a "meaningful basis for distinguishing those few cases in which a death sentence is imposed from the many cases in which it is not Gregg, supra, at 188.

The Supreme Court's reversal of a death sentence in Godfrey v. Georgia, 446 U.S. 420(1980) makes the import of Gregg and Proffitt even clearer. In Gregg v Georgia, supra, the Court had upheld the facial validity of the aggravating factor; "outrageously or wantonly vile, horrible or inhuman." In Godfrey, supra, the Court found that the Georgia courts had not limited the statutory provision to the previously approved construction and therefore the sentence could not stand. The court noted:

[That] if a State wishes to authorize

> capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty . . . It must channel the sentencer's discretion by "clear and objective standards, that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death.

Thus aggravating circumstances such as "especially heinous, atrocious or cruel" cannot be the basis of a constitutional death sentence where no restrictive interpretation of the circumstance is conveyed to the jurors by instructions that suitably direct and limit the jury's discretion.

In Petitioner's case the jury was instructed to consider this aggravating factor and trial judge specifically, relied upon it in imposing the death penalty; On Appeal, the Florida Supreme Court could not make up its collective mind on whether the factor applied or not. Antone v. State, 382 So2d 1205, 1216(1980), " Because of our recent decisions, there may be a question whether this is an appropriate aggravating circumstance". It thus appears that even the Florida Supreme Court is no longer able to construe and apply the term "heinous, atrocious and cruel". At the very least the terms no longer provide the "clear and objective standards that provide specific and detailed guidance" Godfrey, supra, and cannot be countenanced by the Eighth and Fourteenth Amendments.

Additionally, in discussing this aggravating factor, the Court found that regardless of whether the factor applied

or not, it did not matter anyway as there were three other aggravating factors which did apply and any "error in finding this aggravating circumstance does not invalidate the imposition of the death sentence" Antone, supra, at 1216.

It is submitted that the heinous, atrocious, and cruel aggravating factor is, as now construed, unconstitutionally vague and overbroad and any sentence of death such as Petitioner's which relies on such factors for support is unconstitutional. See, Stephen v. Zant, 631 F.2d 397 (5th Cir. 1980).

For the stated reasons the sentence of death imposed on the Petitioner is contrary to the Eighth and Fourteenth Amendments to the United States Constitution.

IN THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA.

CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA	:	
vs.	:	Case No. 76-1356
ANTHONY ANTONE	:	Division "D"
	:	

DEMAND FOR DISCOVERY

The Defendant, ANTHONY ANTONE, by and through his undersigned legal counsel, demands that the prosecutor disclose to defense counsel and permit him to inspect, copy, test, and photograph the following information and material within the State's possession or control, pursuant to RCrP 3.220(a)(1):

1. The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.

2. The statement, including police reports of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemparaneously with the making of such oral statement.

3. Any written or recorded statement and the substance of any oral statements made by the accused and known to the prosecutor, together with the name and address of each witness to the statement.

4. Any written or recorded statements and the substance of any oral statements made by a co-defendant if the trial is a joint one.

5. Those portions of recorded grand jury minutes that

contain testimony of the accused.

6. Any tangible papers or objects which were obtained from or belonged to the accused.

7. Whether the State has any material or information which has been provided by a confidential informant.

8. Whether there has been any electronic surveillance, including wiretapping, of the premises of the accused, or of conversations to which the accused was part; and, any documents relating thereto.

9. Whether there has been any search or seizure and any documents relating thereto.

10. Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

11. Any tangible papers or objects which the prosecuting attorney intends to use in the hearing or trial and which were not obtained from or belonged to the accused.

12. Any F.B.I., police department or sheriff's office reports, commonly referred to as "rap" sheets which reflect the criminal records of persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto. State vs. Coney, 294 So. 2nd 82, (Fla. 1974).

13 Pursuant to RCrP 3.220(a)(2), and to the due process clause of the Fourteenth Amendment of the United States Constitution, any material or information within the State's possession or control which tends to negate the guilt of the Defendant as to the offense charged, or to punishment, or to the credibility of the State's witnesses.

14. Pursuant to RCrP 3.220(c)(1), any legal research or records, correspondence, reports, or memoranda, to the extent that they do not contain the opinions, theories, or conclusions of the prosecuting attorney, or members of his legal staff.

15. Pursuant to RCrP 3.220(c)(2), the names and addresses of the alleged confidential informants, if any.

16. Pursuant to RCrP 3.220(a)(5), such other discovery as justice may require.

PLEASE NOTICE that the State Attorney, Hillsborough County, Florida, must disclose to defense counsel and permit him to inspect, copy, test and photograph the information and material requested hereinabove by the 17 day of March 1976.

DIECIDUE, FERLITA & PRIETO
620 Madison Street, Suite 2-B
Tampa, Florida 33602

Attorneys for Defendant

By Angelo M. Ferlita
ANGELO M. FERLITA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Office of E.J. Salcines, State Attorney, Hillsborough County, Florida, this 2 day of March, 1976 by hand delivery.

Angelo M. Ferlita
ATTORNEY

ROBERT E. BRUNS,

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUTTER:

Q Would you state your name, please, sir?

A Robert Bruns.

Q All right. Mr. Bruns, are you presently living in Hillsborough County?

A Yes.

Q Do you recall coming into my office approximately a week ago and talking with myself and Mr. Ferlita about Mr. Anthony Antone's case?

A Yes.

Q Mr. Bruns, in 1976, were you acquainted with Mr.

Benjamin Gilford?

A Yes, I was.

Q Okay. Did you happen to, toward the latter part of February, 1976, make contact with members of the Hillsborough County Tampa Police Department with respect to information you had regarding Benjamin Gilford?

A Yes.

Q At that time what, if anything, did you tell them about Benjamin Gilford?

A That he had told me he was the one who shot Sergeant Cloud.

Q All right. Did you tell them anything else about anybody else with respect to the Cloud murder?

A At that time, no, I didn't. I told him, I think, that Mr. Haskew was the one that drove the car.

THE COURT: Excuse me, sir. When you say "him," whom are you referring to?

THE WITNESS: Whoever it was, the officer that I was talking to.

THE COURT: Do you know the name of the officer?

THE WITNESS: The original one, no, I can't remember.

THE COURT: Do you know the agency that he represented?

THE WITNESS: I think it was the Tampa Sheriff's Department.

THE COURT: Are you sure of that, or do you just think?

THE WITNESS: I am just thinking. It was Tampa City or the Sheriff's Department officer.

THE COURT: All right, sir. Go ahead, sir. Excuse me, sir.

BY MR. NUTTER:

Q Did you make some sort of an agreement with the people that you talked to, to tape record some conversations between you and Benjamin Gilford?

A Yes.

Q All right. What, if anything, did you tell them about Benjamin Gilford before you were transported back to Bradenton to make these tape recordings?

A I told them that he told me that he had killed Cloud and how he had done it.

Q Okay. Did you mention anything to them about a person by the name of Anthony?

A Yes.

Q What did you tell them about the person known as Anthony?

A That he is the person who paid him the money for killing Cloud.

Q Okay. And did you subsequently talk to any agents with --

MR. McCOUN: Judge, we are having a hard time hearing. I think the defendant is entitled to hear it.

THE COURT: Speak a little bit louder and, counsel, if your client cannot hear him, if you would let me know again, sir.

MR. McCOUN: Thank you.

THE COURT: All right, sir. Go ahead, sir.

BY MR. NUTTER:

Q Did you have occasion to relate that information to anybody with the FBI?

A Yes.

Q Okay. Do you recall the agent with the FBI that you may have talked to about that?

A Dave Malarney.

Q All right. Then, were you taken back to Bradenton and assisted them in making tape recordings?

A Yes.

Q All right. Exactly what did they do? Did they give you some sort of an apparatus in order that that might be done?

A Yes. I was wearing a bodybug and a bugging device was placed in my van and one in my house.

Q All right. Can you speak up a little bit more. It's even hard for me to hear you.

A All right.

Q Approximately how long, over what period of time did this take place?

A Approximately a week.

Q Okay. Did you happen to see the actual tape recordings that were being made of the conversations with Mr. Gilford?

A Yes.

Q All right. Where were they located?

A In a mobile home that the FBI used as a command post, and that was parked about a half a block away from my house.

Q Okay. Why was it that you were able to get these conversations with Mr. Gilford? What was his relationship to you at that time?

A We were friends.

Q Okay. Were you staying with him, or was he staying with you at that period of time?

A He was living with me.

Q Prior to advising the Tampa Police Department or the FBI about this information that you had heard from Gilford, I assume that he had related these things to you at an earlier date?

A Yes.

Q Where was he at the time he related that information to you?

A Sitting right next to me in a bar.

Q Okay. Had you known Mr. Gilford prior to that occasion?

A Yes.

Q Where had you known him?

A I was in prison with him.

Q Where was that?

A DeSoto Correctional Institution.

Q Were you acquainted with Mr. Ellis Marlow Haskew?

A Yes.

Q And how did you know him?

A I was in DeSoto Correctional Institution with him also.

Q Now, did Mr. Gilford ever say anything to you particularly about Antone's role in this particular situation with Detective Cloud?

A I was told that he was the man who delivered the money to him.

Q Okay. Were you told anything else about what his knowledge was with respect to that offense?

A I was told once by Gilford that at the 150 that

he killed Cloud, that Antone didn't know about it.

Q That Antone did not know about it?

A Yes.

MR. CORCES: I am going to object until the time, date and place is established that that conversation was had.

THE COURT: Sustained as to that objection only, sir.

BY MR. NUTTER:

Q Mr. Bruns, was that conversation that you just related had between you and Mr. Gilford after you had returned to Bradenton with the "bodybug" on and that sort of thing?

A Yes.

Q All right. And that was after you were let out of jail by the Tampa Police Department and the FBI and transported down there for that purpose?

A Yes.

Q Do you recall where you were at the time that converation took place?

A Probably at the Stumble Inn. It's a bar on Bradenton Beach.

Q Okay. How far is that from your home?

A It would have been half a block, a block away.

Q All right. Now, with respect to information

that you were trying to get from Mr. Gilford for the authorities, were you directed to ask him any specific questions?

A Yes.

Q What, specifically, were you directed to ask him?

A Specifically? I was to ask him to relate to me again how he'd done it, --

Q All right.

A -- who was involved with him, where, you know, how much he was paid, where he was paid, and that's basically it.

Q All right. In that regard, is that why the topic of the person known as Anthony came up and Mr. Gilford made some reply to you as to his involvement?

A Yes.

Q All right. Now, again, with respect to whether or not a person known as Anthony knew of the Cloud murder at the time that it happened, did Gilford tell you that he did or that he did not?

A He told me that he did not.

Q Did he indicate that he was, that is, Anthony, was perturbed or upset when he discovered that?

A Yes, he did.

Q In what way? What did Gilford tell you about

that?

A That on the day after, following the killing, then, that Anthony was supposed to pay him and that when he found out, you know, about it, he wouldn't pay him; that he was scared to meet with him, and he was really upset about the whole thing.

Q All right. Again, he indicated that Anthony did not know of the killing until after it had occurred?

A Yes.

Q Is that correct?

A That was -- yes.

Q Now, with respect to the tape recordings that were being made, you said that you saw the device that was recording those conversations?

A Yes.

Q Was it your impression that the agents that were making those tape recordings, that the recordings were good recordings, that they had listened to them?

A Yes.

Q After Mr. Clifford was arrested, what did you do?

A How do you mean what did I do?

Q Well, did the FBI keep you and your family somewhere for a period of time?

A Yes, kept us in a motel.

Q For how long were you in a motel like that?

A Approximately two weeks.

Q Okay. After you left the motel, where did you go?

A To North Carolina.

Q Okay. Did the FBI suggest that you go to North Carolina?

A They suggested that I get out of the State of Florida.

Q Did the FBI have a means or a method to contact you in North Carolina?

A Yes.

Q Did they subsequently contact you?

A Yes.

Q Did you return to the State of Florida during the pendency of Mr. Gilford's trial?

A Yes, twice.

Q Did you meet with Mr. Aaron Bowden, the prosecutor, with respect to that case?

A Yes.

Q Did you discuss the case with him?

A Yes.

Q Did you discuss the conversations that you had with Benjamin Gilford when you were in Sarasota before he was arrested?

A Yes, sir.

Q Did you discuss the information that you've testified to with respect to Gilford saying that he had actually committed the murder of Cloud?

A Yes.

Q Did you discuss the information with respect to the man known as Anthony?

A Yes.

Q Did Mr. Bowden ask you anything regarding what Gilford had told you with respect to Anthony Antone?

A Nothing specific.

Q All right. Did he ask you whether or not Gilford told you that Anthone did not know about the slaying until after it occurred?

A No.

Q Were you or did you think at that time that Mr. Bowden knew that information?

A Yes.

MR. CORCES: Objection on the grounds that it's speculative.

THE COURT: Sustained.

MR. NUTTER: Your Honor, I think he can say what he thought. He is not speculating as to what he thought.

THE COURT: If you will rephrase your question

as to his thoughts and not someone else's.

MR. NUTTER: Yes, sir.

BY MR. NUTTER:

Q Mr. Bruns, was it your thought that Mr. Bowden knew the information that you felt was contained on those tape recordings?

MR. CORCES: Objection, unless the predicate is established as to the basis for his thoughts.

THE COURT: Sustained.

BY MR. NUTTER:

Q Mr. Bruns, you certainly had thoughts about what had happened in Bradenton, did you not?

A Yes.

Q You had your impressions of things that had been lead for you to believe, that certain things had taken place, correct?

A Yes.

Q Did you believe that the recordings that the FBI had made were recordings of your conversation between you and Mr. Clifford?

A Yes.

Q Did you believe that Mr. Bowden had access to those tape recordings?

A Yes.

Q Did you believe that the statement that you

made, I am sorry, that Mr. Gilford had made to you, that Anthony did not know of this murder until after it occurred, did you believe that that was on the tape recordings?

A Yes.

Q Did you believe that Mr. Bowden had listened to that and heard that statement?

A Yes.

Q Mr. Bruns, I think one of the reasons, if I am not mistaken -- you correct me if I am -- that you came forward was that you read an article in the Tampa Tribune about Mr. Antone within the recent past; is that right?

A Yes.

Q In that article, I believe, Mr. Antone was characterized as being the mastermind of this situation with Richard Cloud. Whom did Gilford tell you was the mastermind of this incident?

A Victor Acosta.

Q All right. Do you recall, just numerically, how many agents -- Tampa Police Officers and/or FBI -- that may have been involved in the surveillance and recording of those conversations in Bradenton?

A There was about fifteen.

Q About fifteen?

A Uh-huh.

Q Did you see them pretty much on a daily basis down there?

A Yes.

Q Mr. Bruns, had you ever seen Mr. Ferlita or myself up until the time that you came to our office?

A No.

Q How did you get Mr. Ferlita's name?

A Out of the newspaper article.

Q All right. For what reason was it that you came to our office to give us this information?

A Because of the way he was -- it really flipped me out to see him portrayed like that because it wasn't like that. He wasn't the mastermind as far as I knew.

MR. CORCES: I couldn't hear that. Could you speak louder? I can't hear you.

THE COURT: If you would start from the beginning, sir, and speak loud. Mr. McCoun, are you able to hear, sir?

MR. McCOUN: I can, Judge, but it is slight.

THE COURT: All right, sir. If you would speak a little bit louder.

THE WITNESS: Because of the way the newspaper article portrayed him as being the mastermind. That was completely opposite of the way it was and what I knew.

BY MR. NUTTER:

Q All right. Mr. Bruns, has anybody promised you anything to get you to come forward and to make this statement?

A No.

Q Has anybody threatened you in any way to get you to do that?

A No.

Q Are you doing this of your own free will?

A Yes.

MR. NUTTER: May I have a moment, Your Honor?

THE COURT: Yes, sir.

MR. NUTTER: Your Honor, I tender the witness at this time for cross-examination.

THE COURT: All right. Mr. Corces?

MR. CORCES: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. CORCES:

Q Mr. Bruns, when did you say you first went back to North Carolina or went to North Carolina in 1976?

A Yes. It would have been sometime the first part of March.

Q The first part of March, 1976. Now, you are not insinuating by any change that they were trying to hide you, are you?

A No.

Q You were available to come to Tampa any time any defense lawyer wanted to talk to you, weren't you?

A The FBI knew of my whereabouts. They were the only ones.

Q As a matter of fact, you did return to Tampa and were here on June 2, 1976, were you not?

A Yes.

Q And Mr. Richard Edwards of the Public Defender's Office took your deposition, did he not?

A Yes.

Q On that date?

A Yes.

Q And you gave him all the facts known to you at the time?

A Yes.

Q Is that correct?

A Yes.

Q Did you make this statement to Mr. Edwards? Did you tell him about this, these facts, the fact that Anthony Antone did not know anything about this murder until after it occurred?

A It was never asked of me. I never --

Q All right. Did you volunteer it?

A No.

Q All right. And that was on June 2, 1976?

A Yes.

Q Okay. As a matter of fact, the law enforcement officers had told you that you would have to come to Tampa any time any defense lawyer wanted to talk to you, isn't that true?

A No.

Q They didn't tell you that?

A I wasn't told that.

Q You were asked to come to Tampa to have Mr. Edwards talk to you, weren't you?

A I came on a subpoena to Gilford's trial.

Q You came on a subpoena to Gilford's trial. But you never testified at his trial, did you?

A No.

Q Why?

A He pled guilty.

Q All right. Prior to the trial, did you not give a deposition?

A Yes.

Q Okay. Now, did you at any time tell any member of any law enforcement, either the Federal Bureau of Investigation, the federal government, or any state law enforcement official, of the fact that Benjamin Gilford had told you that Anthony Antone did not know anything about

the Cloud murder until after it occurred?

A No.

Q You told no one?

A No.

Q Did you tell agent Malarney?

A No.

Q Did you tell Agent Caro?

A No.

Q Did you tell E. D. Williams?

A No.

Q Can you think of any member of any law enforcement that you made such a statement to?

A No.

Q Now, do you recall talking to Agent David J. Malarney at the Tampa Police Department on February 20, 1976?

MR. NUTTER: Your Honor, may I object just a minute and ask to approach the bench?

THE COURT: Well, what is the purpose for approaching the bench? We have no jury.

MR. NUTTER: Your Honor, I filed a motion for discovery in this matter asking that Mr. Corces turn over to me the statements that FBI agents wrote down with respect to any statements Mr. Bruns made to them, and I think that we are entitled to those docu-

ments. I notice that he has them in his possession, and I have not been given those yet.

THE COURT: Mr. Corces, are they in your possession?

MR. CORCES: I have one copy of certain documents in my possession, yes, sir. They subpoenaed Agent Malarney subpoena duces tecum. They had an opportunity to merely ask him, and I ask defense counsel here if he was asked.

THE COURT: All right, sir.

MR. NUTTER: Your Honor, I think that my motion and demand for discovery on that takes precedence on that. I should have had that before his deposition but, frankly, I didn't have time to come to the Court and apply for an order from the court.

THE COURT: Mr. Corces, any problem in taking a short recess so he can read it?

MR. CORCES: No, sir.

THE COURT: All right. How long is the document?

MR. CORCES: It's about six or seven pages.

THE COURT: All right. Why don't you just sit down there and read it, Mr. Nutter.

MR. NUTTER: Yes, sir.

THE COURT: If you need any other time other

than what I am giving you, please let me know and I will certainly give it to you.

MR. NUTTER: Yes, sir.

THE COURT: All right, sir.

MR. NUTTER: Your Honor, could we take a brief recess for about ten minutes?

THE COURT: All right, sir. Mr. Bailiff, we will be in recess for ten minutes.

[There was a short recess.]

THE COURT: Mr. Corces and Mr. Ferilta, before bringing the witness in --

MR. NUTTER: Yes, sir.

THE COURT: Is there anything you would like to put on the record as to what was discussed in chambers in connection with the television cameras?

MR. NUTTER: Yes, Your Honor. We have requested that the television camera not be photographing or televising the witness, that is, Mr. Bruns, in this case, his face or features, anyway, during the period of time that he is testifying because he has had some difficulties as a result of this case anyway and it would perhaps create more for him. He has asked us to ask the Court that, and I think that the arrangement that we have agreed upon is satisfactory.

THE COURT: Mr. Corces, does the State have any

objection or comment?

MR. CORCES: Yes, Your Honor. The State has no objections as long as the record is clear that it is a defense request. As far as the State of Florida is concerned, we do not care whether or not any photographs are taken by the press or the television cameras or whatever may be.

Insofar as the State of Florida, we think they have a right to be here, and we have no objections, and let the record clearly reflect that it's the defense that doesn't want his picture taken.

THE COURT: All right. As I understand the agreement that was made with Channel 8, Channel 13, members of the Tribune and also the Times, there would be no photography during the testimony of Mr. Bruns. Is this correct? I see members of the press and everybody here.

All right. If you would turn your camera around, please. All right. Thank you.

MR. NUTTER: Thank you, Your Honor.

THE COURT: All right. If you would bring in your witness. It's your witness, Mr. Corces.

BY MR. CORCES:

Q All right. Mr. Bruns, let me go back a moment to your testimony concerning Mr. Gilford. When did Mr.

Gilford first come to your home in the year 1976?

A It would have been right around the 1st of January.

Q January, 1976?

A Yes.

Q All right, sir. Was he staying with you at your home?

A Not at that time.

Q Did he subsequently move into the home?

A Yes.

Q Okay. When was that?

A Around the 1st of February, 1976.

Q All right. During this time that he was at your home in February, 1976, or prior to that, prior to his moving to your home, did you have any conversations with him concerning the violation of laws of the State of Florida?

A Yes.

Q What were those conversations?

A We talked about my getting involved in passing some $100 counterfeit $100 bills.

MR. NUTTER: Your Honor, I object at this point. It goes beyond the scope of direct examination.

THE COURT: Overruled.

BY MR. CORCES:

Q Some $100 --

A Yes.

Q -- counterfeit bills?

A Yes.

Q What other --

MR. NUTTER: Your Honor, again I object in that he is asking specific questions about other unrelated criminal offenses that have nothing to do with this case here at all and particularly have nothing to do with Anthony Antone.

MR. CORCES: All right.

THE COURT: All right, sir.

BY MR. CORCES:

Q What conversations did you have with Mr. Gilford with relation to any murders?

MR. NUTTER: Your Honor, again I object unless it's the particular case that we are here before the court on.

THE COURT: What is the purpose of the general question, Mr. Corces?

MR. CORCES: Well, I am trying to get the general picture for the Court to understand, eventually, as to what the relevancy of this witness, if any, is with respect to Mr. Antone.

THE COURT: All right, sir. Overruled. Pro-

ceed. Mr. Nutter, this is an evidentiary hearing.

MR. NUTTER: Yes, sir.

THE COURT: There is no jury present.

MR. NUTTER: That's correct, Your Honor.

THE COURT: All right. Let's proceed.

BY MR. CORCES:

Q All right. Did you have any conversations with Mr. Gilford during this month of February or thereabouts concerning any murders?

A Yes.

Q What were those conversations?

A He talked to me about him killing Cloud --

Q All right, sir.

A -- and that there was a possibility of doing some more.

Q Doing some more?

A Yes.

Q What did he tell you about that?

A That there was a possibility that I could be the driver in a five-hit, you know, contract to kill five people.

Q Do you know the names of those five people?

A No. I know one that I can remember.

Q Who is that?

A That was a man named Dempsey.

Q Okay. Now, did you agree with him to participate in any of these murders?

A No.

Q You did not?

A No.

Q Did he continue to talk to you about committing these murders?

A Yes.

Q All right. If you did not agree, why is it that he continued to talk to you about them?

A Because after I contacted the FBI, they told me to go along with him and get him to talk about anything that he would talk about to me.

Q Okay. Now, did he tell you anything with respect to the murder of Detective Cloud?

A Yes.

Q Was that in February, 1976?

A Yes.

Q All right. What was it that he told you?

A Pardon me?

Q What did he tell you?

A That he was -- well, he described to me how he done it and that was all.

Q How who done it, Gilford?

A Yes, how he killed him.

Q What did he describe?

A How he went up, knocked on the door, asked for Mr. Johnson or Jones. Mr. Cloud answered the door, and he said something smart like he was his executioner and shot him once through the screen door, pulled open the screen door and followed Cloud into the house and shot him two or three more times.

Q All right, sir. Did he give you any other details concerning the assassination of Mr. Cloud?

A I don't understand what you want, you know.

Q Did Mr. Gilford give you any other details concerning the murder of Detective Cloud other than what you've just testified?

A Yes.

Q What other details did he give you?

A That Marlow Haskew drove the car. They used Marlow's car to do it, the crime, with, and how he was -- had grown a goatee.

Q Had what?

A How Gilford had grown a goatee, how Anthony Antone paid him, you know, the money.

Q He told you how Anthony Antone had paid the money?

A Yes.

Q Did he tell you how much he had paid?

A Yes. I can't remember. You know, I know it was -- I think the agreement was for $10,000, but he didn't get that.

Q All right. Did he tell you who supplied the weapon for this murder?

A Yes.

Q Whom did he tell you supplied the weapon?

A Marlow Haskew.

Q Did he tell you any other person that supplied this weapon?

A No.

Q Did he tell you who supplied the silencer for this weapon?

A Not that I can remember.

Q Benjamin Gilford did not tell you who supplied the silencer for this weapon?

A He may have. I can't remember. You know, the first that I remember anything about a silencer was the other day when you asked me about it.

Q Okay. Now, did he tell you how much money Anthony had paid?

A I think so. I can't remember an exact amount.

Q Did you ever meet Anthony Antone?

A No.

Q During any of this time?

A No.

Q Well, you knew Mr. Haskew; is that correct?

A Yes.

Q Right. Now, did he tell you how much money Anthony Antone paid for this murder to Mr. Gilford?

A Yes, he did.

Q How much did he pay?

A I can't remember.

Q All right. What other information did he give you?

A About the murder?

Q Uh-huh.

A Oh, how -- how he didn't get paid for about two weeks and how he went and stayed at a cabin by a lake north of Tampa waiting to get paid for it.

Q Uh-huh. Now, as I understood your testimony here is that Gilford told you that Antone had become upset when he found out that Cloud had been murdered?

A Yes.

Q Okay. Did he explain to you what he thought the money was for, Gilford?

A I don't understand the question.

Q Well, you've testified that Mr. Gilford told you that Antone had paid money.

A Yes.

Q Did he also explain to you what Anthony thought the money was for?

A At the time he paid him, he knew what it was for. That's why he was upset.

Q Well, did he tell you where he had gotten the money?

A It came from Victor Acosta I found out later.

Q That Anthony Antone had obtained the money from Victor Acosta?

A Yes.

Q Is that what Gilford told you?

A Yes.

Q Now, did he explain to you at the time he received the money as to what he thought it was for, what Antone thought it was for?

A At the time that Gilford received the money, Antone knew what it was for.

Q No. At the time Antone received the money, did he know what it was for? Did Gilford explain that to you?

A No.

Q Okay. Now, let me ask you this question. Did you ever talk to Joe Collum --

A Yes.

Q -- in North Carolina?

A Yes.

Q Did you give him any information concerning this murder?

A We talked about it, yes.

Q Okay. Did you at any time, in talking to him in North Carolina, inform him that Anthony Antone did not know anything about the Cloud murder until after it had occurred?

A No.

Q You didn't tell him that?

A Mostly every time anyone asked me anything to do about it, it was always Buck's involvement.

Q It was always what?

A Clifford's involvement. No one ever, you know, asked me about any one of the other people.

Q Now, everything you are testifying to here is what Clifford told you, right?

A Yes.

Q You don't know anything. You never have discussed anything with Mr. Antone personally?

A No.

Q Did you ever discuss anything with Mr. Haskew personally --

A No.

Q -- concerning these murders?

A I haven't seen Mr. Haskew since 1972.

Q All right. Isn't it true that Mr. Gilford told you sometime in February, 1976, that Anthony had been the person who had hired Gilford to do the shooting?

A [Witness shakes head.]

Q That is not true?

A No.

Q Isn't it true that Mr. Gilford told you that Anthony had been the one that supplied the silencer?

A I don't remember him saying that.

Q You don't remember him saying that?

A No.

Q Is it possible?

A I guess. I don't remember it.

Q Isn't it true that Gilford advised you that Haskew had obtained a .32 automatic from Anthony?

A I don't think so. I think -- I was under the -- I am still under the impression that it came from Haskew.

Q Pardon?

A I can remember it coming more from Haskew.

Q Do you remember talking to Agent David J. Mahoney on February 20, 1976?

A I remember talking to him. I don't know -- remember the date.

Q All right. Do you remember talking to him at

the Tampa Police Department?

A No, I never talked to him at the Tampa Police Department.

Q Where did you talk to him at?

A A motel.

Q Okay. Do you remember making a statement to this effect to Mr. Malarney?

MR. NUTTER: Your Honor, I'm going to object in that if counsel wants to impeach the witness with a contradictory statement, he doesn't have a deposition here that he's working from. If he wants to do that, I think he can call that witness and put him on the stand to ask him what this witness may have said to him. I think it's improper for him to use anything other than a deposition, which our rules recognizes as a proper form of impeachment.

I object to him using any other document other than a deposition to impeach him.

THE COURT: No, sir. Overruled. Proceed.

BY MR. CORCES:

Q Tell me whether or not you made this statement in words to this effect to Mr. Malarney when he was interviewing you on February 20, 1976: "That Haskew and Gilford were hired to do the shooting by an individual known to Gilford as Anthony."

Did you now tell agent Malarney that?

A I don't believe so. I think I told him they were paid by a man named Anthony.

Q Not that they were hired?

A No.

Q Do you remember telling Agent Malarney that Gilford had advised you that after checking the situation out, a .32 automatic was obtained by Haskew from an individual known to Gilford as Anthony? Do you remember making that statement to Agent Malarney?

A I don't remember it, no. If all of these statements are referring to the first time that I talked to Agent Malarney, the only conversation that I had with Gilford then was once where he talked, you know, just told me about it, just hit me about it one day in a bar, and I didn't know that many details to it then.

Q You didn't know that many details to it on February 20, 1976?

A Not -- not as later on because I hadn't heard it four or five or six times.

Q You knew the details about the money being paid by Anthony --

A Yes.

Q -- on February 20, did you not?

A Yes.

Q You knew the details about the fact that Detective Cloud was shot through the door, did you not?

A Yes.

Q You knew the details about the fact that someone by the name of Victor Acosta wanted this done, did you not?

A Yes.

Q You knew the details about the fact that it was Haskew's car that was used in this murder, did you not?

A Yes.

Q You knew the details about the fact that Haskew did the driving, did you not?

A Yes.

Q But you say you did not know the details about where the .32 automatic was obtained?

A Not in the original time I talked to Dave Malarney, I don't think I did. At a later time, maybe the next day or the next day, you know, on until Gilford was arrested, because I heard his description of the killing every day for that next week, and I got more and more details each time.

Q But you didn't know these details on February 20, 1976, when you talked to Agent Malarney?

MR. FERLITA: Judge, I object. I think that has been asked and answered on numerous occasions.

THE COURT: I believe so, Mr. Corces. Proceed on, sir.

BY MR. CORCES:

Q You gave a statement to Mr. Nutter and to Mr. Ferlita by deposition?

A Yes.

Q In that statement did you tell them that Joe Collum had told you that Anthony Antone had died of a heart attack?

A Joe Collum told me that everyone that was involved in the case was dead.

Q Everyone involved in the case?

A Yes.

Q He didn't tell you specifically Anthony Antone?

A No.

Q Did you testify to that in the deposition?

A Yes. That's the impression I had.

MR. FERLITA: Your Honor, we would ask that the predicate be laid for the time, date and place of that statement he's talking about.

THE COURT: All right, sir.

BY MR. CORCES:

Q You talked to him in North Carolina?

A Yes, sir.

Q When?

A In 1978.

Q All right. Did you ever have a discussion with E. D. Williams, Major E. D. Williams of the Tampa Police Department sometime after you were arrested?

A I would need to know when after I was arrested so I could --

Q Okay. Let's ask you: When were you arrested?

MR. NUTTER: Your Honor, I interpose an objection here. Again, I asked Mr. Corces to provide me with any documents with respect to conversations that Mr. Bruns had with anybody, and I asked for police reports particularly with respect to that.

MR. CORCES: I do not have that document. I don't have it. Now, they subpoenaed duces tecum. They had these witnesses there with a subpoena duces tecum and could very well have asked them at the time. I don't have the documents.

MR. NUTTER: If he doesn't have it, that is all right.

MR. CORCES: I don't personally have the documents.

THE COURT: All right. Mr. Williams is here, I believe. You did subpoena him?

MR. NUTTER: Yes, sir.

THE COURT: Was the subpoena for here or a depo-

sition?

MR. NUTTER: No, sir. He is subpoenaed for here this afternoon.

THE COURT: With the documents?

MR. NUTTER: Yes, sir. It is a duces tecum.

THE COURT: All right. Thank you. You may proceed, sir.

BY MR. CORCES:

Q Do you remember when you were arrested?

A Yes, sir.

Q When was that?

A February 20.

Q February 20, 1976 What was that for?

A Contempt of court.

Q Pardon?

A Contempt of court.

Q Okay. Now, after you were arrested, did you make the initial contact to any law enforcement officer pertaining to th s case?

A Yes.

Q And when was that?

A When?

Q Yes.

A February 20.

Q Okay. And do you know whom you talked to?

A I don't remember his name, no.

Q Okay. Do you know how long you talked to him?

A Maybe five or ten minutes.

Q Okay. Do you know whom you talked to after that?

A Dave Malarney.

Q Dave Malarney. Why did you contact law enforcement pertaining to the Cloud murder?

A Because I was upset by it.

Q Pardon?

A Because I was upset because of it. Gilford had told me about it the day before. My wife had told me that morning that Gilford had exposed himself to my daughter, and she wanted him out of the house.

Q That's the reason you wanted Gilford out of your house, --

A Yes.

Q -- was that he had exposed himself to your daughter?

A Yes.

Q And that's the reason you called the Police Department?

A Yes.

Q Now, after you had made this first contact with law enforcement officers, do you remember having a conver-

sation sometime on the 20th or 21st with an E. D. Williams, a major of the Tampa Police Department.

A I don't remember anybody's name other than Dave Malarney's that night.

MR. CORCES: Would you have Mr. E. D. Williams walk in, please? Call Mr. E. D. Williams.

A MAN: [Enters through a courtroom door.]

THE COURT: All right, sir. Just remain there.

MR. CORCES: Look at this gentleman right there.

THE COURT: Thank you.

THE MAN: [Leaves through a courtroom door.]

BY MR. CORCES:

Q Do you remember ever having a conversation with him?

A Yes.

Q Okay. Did you tell him anything concerning the facts that had been related to you by Mr. Gilford?

A Can I ask a question about --

Q No. You answer.

A I don't remember. I would like to try and set a time frame for when I talked to him.

Q Well, do you recall talking to him?

A Yes.

Q Do you recall where you talked to him at?

A No. That's why I'd like to --

Q All right. If you had talked to him, would it have been around February 20, 1978?

A Yes, and it could have been in a motel room with eight or ten other people in there.

Q All right, sir. Wherever it was, did you relate anything to him pertaining to what Gilford had told you?

A Directly?

Q Uh-huh.

A I can't remember talking directly to him. I can remember --

Q Is it not true that you made the statement to him that the murder was set up by Anthony?

A I don't remember. I told you I talked to one officer in the city jail, and then I talked to Dave Malarney, and then when I was taken to Bradenton, I was put -- they had a motel room, and I went in there and there was eight or ten people in that room.

I can't specifically remember talking to him.

Q Okay. Do you deny having made a statement to him, or in his presence, to the effect that Gilford had told you the murder was set up by Anthony?

MR. FERLITA: Your Honor, I object. He just asked the question and the witness answered he didn't remember.

THE COURT: Answer the question. Overruled.

BY MR. CORCES:

Q Do you deny having made that statement?

A No.

Q You don't deny it?

A I can't remember making it.

Q You can't remember making it but you don't deny it?

A No.

Q Okay.

A I think all the time that I referred any time to Anthony, it was Anthony "paid."

Q Okay. Now, on February 20, 1976, did you know Anthony Antone by his last name?

A I don't remember. I don't remember when I was aware of his full name, you know, whether --

Q You don't remember?

A Well --

Q All right. Let me ask you this question. Was there a period of time that you only knew Anthony Antone by the name of Anthony?

A Probably in the very beginning, yes.

Q And by the very beginning, are we talking about February, 1976?

A Yes.

Q Okay. Do you recall talking to any police officers about a man named Anthony?

A Yes.

Q And do you recall the fact that you did not know his last name?

A I can't specifically remember that no, You know, I can remember, you know, telling them that Clifford killed him, Haskew drove the car and Anthony paid for it. I can remember that. You know, I don't know when -- when was fully aware of Anthony's last name.

Q Do you recall the fact that they were trying to find out who this Anthony was?

A Yes, that is why I was bugged.

Q And you did not know, isn't that correct?

A No, I don't think so.

Q You didn't know who Anthony was at the time?

A Right, at the very first time that I talked to him --

Q That's correct. On February 20, you did'nt know that.

MR. NUTTER: Your Honor, if he will let the witness finish his answer. He has interrupted him.

THE COURT: All right. If you would, please, Mr. Corces.

BY MR. CORCES:

Q During this time of February 20 or February 21, 1976, you did not know who Anthony was?

A On February 21 I would have known.

Q Okay. But you didn't know it on February 20; is that correct?

A I'm not sure. I can't remember, you know, whether that's -- I called Gilford Buck the whole time. I don't know whether I was fully aware of Anthony's name at that time or not.

Q Well, let me ask you this question. You say that they sat you up with a bodybug.

A Yes.

Q And I understood your testimony was that they were directing you to get Gilford to make certain statements?

A Yes.

Q Were they asking you to get Gilford to name names?

A Yes.

Q Was one of them who Anthony was?

A Yes.

Q Okay. So, at that time, at the time you started these bodybugings, you didn't know who Anthony was?

A I -- they had me getting Acosta's name and Haskew's name, you know, down on tape for them.

Q Uh-huh. Uh-huh. But at the time you first placed these bugs upon your person and in your home and in your van, this wiretapping equipment, you didn't know who Anthony was?

A I can't remember.

Q Wasn't one of the purposes of that taping equipment to find out who Anthony was? Isn't that true?

A That wasn't the whole purpose, no. It was to get --

Q One of the purposes, isn't that true, because you did not know on February 20 who Anthony was?

A It's like I told you. I can't remember that, whether I did or not, whether I said Anthony, like I knew his whole name, or not.

MR. CORCES: You may inquire.

THE COURT: Your witness, Mr. Nutter.

MR. NUTTER: I have no questions, Your Honor.

THE COURT: All right. You may step down.

MR. FERLITA: Your Honor, with the Court's permission, may he leave or exit from this door?

THE COURT: I have no objection.

MR. NUTTER: Thank you very much, Your Honor.

[The witness leaves the courtroom.]

THE COURT: All right. Who is your next witness, please?

MR. NUTTER: All right. Your Honor --

THE COURT: The television can go back to normal if they want.

MR. NUTTER: -- I would call Major E. D. Williams and, again, my questions to him are going to go into the conversations with respect to what Mr. Bruns told him that he overheard from Mr. Gilford and so forth. I think Mr. Corces is --

MR. CORCES: Now I will agree it's admissible.

THE COURT: All right. Everybody is in agreement then. All right. Let's proceed.

MR. NUTTER: E. D. Williams.

THE COURT: Mr. Williams, please.

E. D. WILLIAMS,

being recalled, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUTTER:

Q Mr. Williams, you've already stated your name for the record and your affiliation with the Tampa Police Department. When you left the stand sometime ago, I was asking you about your association with Mr. Robert Bruns. Do you recall that gentleman, sir?

A Yes, sir.

Q All right. And at the time that you came in contact with him, you were assigned to the task force that

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ANTHONY ANTONE,

Petitioner,

vs. Case #83-5644

CHARLES G. STRICKLAND, JR., Superintendent, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida; JIM SMITH, Attorney General, State of Florida,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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OPINION BELOW

The following reported opinions are relative to the petition for writ of certiorari.

Antone v. State, 382 So. 2d 1205 (Fla. 1980) (opinion on direct appeal to the Supreme Court of Florida)

Antone v. State, 355 So. 2d 777 (Fla. 1977) (remand by Florida Supreme Court for United States v. Agurs, 427 U.S. 97 (1976) hearing).

Antone v. State, 410 So. 2d 157 (Fla. 1982) (opinion of Florida Supreme Court in post conviction appeal)

Antone v. Strickland, 706 F. 2d 1534 (11th Cir. 1983)

JURISDICTIONAL STATEMENT

Respondent accepts Petitioner's statement of the case.

STATEMENT OF THE CASE

A. Course of prior proceedings.

Respondent accepts petitioner's statement with respect to course of prior proceedings.

B. Facts Relevant to the question presented.

Respondent accepts the "Facts Relevant to the Questions Presented" as they appear in the Petition with the following additions, exceptions or reservations.

1. The Statements appearing in the last three paragraphs of page 11 of the Petition relevant to what the prosecutor and petitioner's counsel did or did not argue as these paragraphs contain argumentative matter.

2. The statement appearing in page 12 of the Petition wherein Petitioner argues he was denied a continuance of the state evidentiary hearing. It is correct that he was denied a continuance, but the state trial judge had forewarned counsel three days earlier at a pre-evidentiary hearing that the hearing would be conducted. Moreover, the witness to which Petitioner refers to were attorneys which Petitioner wanted to call as experts on ineffectiveness. Both the state trial judge and District Court agreed that experts were not necessary because the judge was an attorney and could understand the evidence (A-123-124).

REASONS FOR DENYING CERTIORARI

None of the questions which Petitioner raises merits review by the Court. The questions which Petitioner seeks

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QUESTION TWO	4
Whether petitioner was denied the effective assistance of counsel at the sentencing phase of his capital trial by counsel's failure to present evidence in mitigation, by counsel's failure to present other mitigating circumstances outside the statutorily prescribed factors, by counsel's failure to adequately or effectively present argument during the penalty phase or by counsel's failure to request special jury instructions to clear up deficiencies in the standard jury instructions?	
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Whether in the application of the especially heinous, atrocious and cruel aggravating factor to petitioner's case, the State of Florida had used such a vague and overbroad construction of the factor that the Eighth and Fourteenth Amendments are violated?	
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Whether the failure of the State to comply with the requirements of Brady v. Maryland, and United States v. Agurs, by failing to disclose the existence of a relevant witness thereby precluding petitioner from having a witness to testify in the penalty phase of his capital trial as to the circumstances of the offense denied petitioner his Eighth and Fourteenth Amendment rights?	
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answered either have been answered, involve factual matters, or factually such that Petitioner has no standing to raise. To elaborate:

QUESTION ONE

> Whether the Principles of Payton v. New York, should be applied retroactively to a case raising the issue for the first time on callateral review or whether the federal courts are barred under Stone v. Powell from considering the Payton v. New York issue.

The Court answered the question in United States v. Johnson, _____U.S._____73 L. Ed 2d 202 (1982). Therein the Court held that Payton v. New York, 445 U.S . 573 is to be given retroactive application to convictions that were pending on direct appeal at the time the decision was rendered. Payton was decided on April 15, 1980. The first time Payton was raised by Petitioner was when he filed his motion for post conviction relief in state court on January of 1982. Stone v. Powell, 428 U.S. 465 (1976) prohibits consideration of Fourth Amendment claims by way of federal habeas unless the state has failed to provide the opportunity for a full and fair litigation of his claim. Petitioner argues that he was not given a full and fair opportunity to be heard in state court because Florida law at the t'me was controlled by State v. Perez, 277 So. 2d 778 (Fla. 1973) which allowed warrantless arrests in the home.

Petitioner miscomprehends the meaning of a fair opportunity to be heard. Florida Rule of Criminal Procedure 3.190(b) and (i) provided him with the opportunity to litigate this issue. He could have raised the issue then, regardless the existing law, and set the predicate for certiorari review in this Court as did the Petitioner in Payton. In Payton the New York Courts had denied Payton's claim on the grounds that the law was well established. Nevertheless, by raising the issue in the Courts of New York he ultimately succeeded in this Court.

Moreover, as this court's decision in Payton reflects the "tools" for raising this issue were available, Engle v. Isaac, 456 U.S. 107 (1982) because many jurisdictions had already held warrantless arrests in the home unconstitutional, Payton, 445 U.S. at 575.

Since this question and any corollary issue it may raise has been answered by this Court, this question does not merit certiorari.

QUESTION II

> Whether petitioner was denied the effective assistance of counsel at the sentencing phase of his capital trial by counsel's failure to present evidence in mitigation, by counsel's failure to present other mitigating circumstances outside the statutorily prescribed factors, by counsel's failure to adequately or effectively present argument during the penalty phase or by counsel's failure to request special jury instructions to clear up deficiencies in the standard jury instructions?

One need only read the question which Petitioner propounds to see that he is not asking the Court to answer a significant constitutional question. He is asking the Court to review the evidence and substitute it's judgment for that of the Florida Courts, the District Court and the Circuit Court of Appeal. This Court has said it does not take cases simply to grant a second appeal or to review evidence and discuss specific facts. United States v. Johnston, 268 U.S.220 (1925), Graves Manufacturing Company v. Linde Co., 336 U.S. 271 (1949).

As Petitioner recognizes in his petition, (Petition p.12) there was an evidentiary hearing held in state court on the issue of ineffectiveness of counsel. See also Antone v. Strickland, 706 F. 2d 1534 (Fla.1983). At that evidentiary hearing petitioner was afforded full opportunity to present any evidence in support of his ineffectiveness claim. Nevertheless, as petitioner

again recognizes, petitioner's counsel refused to let his trial counsel testify at the evidentiary hearing. (Petition P. 12) Notwithstanding, some testimony was presented (A-128 footnote 7) and the state trial court made specific findings with respect to the ineffectiveness of counsel claims. These findings were reviewed and approved by the Florida Supreme Court. Antone v. State, 410 So. 2d 157, 160-161 (1982). The The District Court, after first refusing to conduct a further evidentiary hearing in view of the fact that Petitioner had refused to carry his burden (A-128) applied the precepts of Sumner v. Mata, 449 U.S. 539 (1981) and 28 U.S.C. §2254(d). In reviewing the District Court's decision the Eleventh Circuit concurred. Antone v. Strickland, 706 F. 2d 1534, 1540 (1983).

If, then, there is any question that Petitioner should seek answered but, significantly, does not, it should be one surrounding the misapplication of 28 U.S.C. 2254(d). He did not raise such a question below and does not raise one here.

Were this Honorable Court to grant certiorari on the question which Petitioner propounds it would be ignoring its own precepts because it would be deciding a factual issue that, presumptively, has been correctly decided by the Florida Courts.

QUESTION III

Whether in the application of the especially heinous, atrocious and cruel aggravating factor to petitioner's case, the State of Florida had used such a vague and overbroad construction of the factor that the Eighth and Fourteenth Amendments are violated?

This issue is the least meritorious of all. While the state trial court in imposing sentence did find the crime to have been committed in a heinous, atrocious or cruel manner the Florida Supreme Court in reviewing the sentence questioned the propriety of that finding; nevertheless, determined the sentence to be appropriate even absent that statutory aggravating factor. Antone v. State, 382 So. 2d 1205, 1216 (Fla. 1980). The Eleventh Circuit recognized that the Florida Supreme Court had not held this aggravating circumstance to have been appropriately found. Antone v. Strickland, 706 F. 2d 1534, 1538-1539 (11th Cir. 1983).

Consequently, assuming arguendo, that the Florida Supreme Court, in some other case, may have given an overly broad construction to that factor, it did not do so in Petitioner's case. Thus Petitioner has no "standing" to contest the constitutionality of Florida's death statute as applied. United States v. Raines, 362 U.S. 17 (1960), County Court of Ulster County, New York, v. Allen, 442 U.S. 140 (1979).

QUESTION IV

> Whether the failure of the State to comply with the requirements of Brady v. Maryland, and United States v. Agurs. by failing to disclose the existence of a relevant witness thereby precluding petitioner from having a witness to testify in the penalty phase of his capital trial as to the circumstances of the offense denied petitioner his Eighth and Fourteenth Amendment rights?

Once again Petitioner mistates his question. His question surrounds the alleged failure of the state to apply Brady v. Maryland, 373 U.S. 83 (1973) and United States v. Agurs, 427 U.S. 97 (1979). Yet in the body of his argument he says the Eleventh Circuit misapplied Title 28 U.S.C. 2254 (d) and

Sumner v. Mata, 449 U.S. 539 (1981). It is unclear which question Petitioner wants answered. Does it revolve around the failure to comply with Brady and Agurs or is it concerned with a misapplication of Sumner and 2254(d)?

A full blown evidentiary hearing was held in the state trial court. The judges detailed findings were set out in the Florida Supreme Court's opinion on review. Antone v State, 410 So. 2d 157, 159-160 (1982). The lower courts applied 2254(d).

Petitioner suggests that Judge Kravitch's concurring analysis is the correct one. But, assuming it is, Petitioner fails to understand that Judge Kravitch, perhaps without realizing, also applied 2254(d) because her ultimate conclusion that the "Brady" violation was non-prejudicial, was a finding also made by the state trial judge:

> ". . . even if there had been, which there was not, a specific request for this evidence there is no reasonable likelihood that it would have affected the outcome of the trial or sentence."
>
> Antone v. State, 410 So. 2d 157, 160 (Fla. 1982).

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Respondents, and a member of the Bar of the United States Supreme Court, hereby certify that on this 29th day of October, 1983, I served one copy of the Brief of Respondent In Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on Mr. Tom McCoun, Esquire, Louderback, McCoun and Helinger, 1 Plaza Place NE, Suite 1009, St. Petersburg, Florida 33701 by a duly addressed envelope with postage prepaid.

OF COUNSEL FOR RESPONDENTS